

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 904.

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THE UNITED STATES, APPELLANT,

vs.

WONG KIM ARK.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF CALIFORNIA.

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## INDEX.

	Original.	Print.
Citation .....	1	1
Acknowledgment of service of citation .....	2	1
Petition for writ of habeas corpus filed October 2, 1895 .....	3	1
Order for writ of habeas corpus .....	5	2
Writ of habeas corpus and return thereto .....	6	3
Writ of habeas corpus and marshal's return .....	7	4
Order setting case for hearing .....	8	5
Commitment .....	9	5
Petition for writ of habeas corpus filed November 11, 1895 .....	10	5
Intervention of the United States .....	16	9
Stipulation as to facts .....	18	10
Order allowing amended petition to be filed and minute of hearing .....	21	11
Opinion .....	22	12
Order discharging petitioner and allowing appeal .....	43	22
Order of discharge .....	44	23
Recognizance .....	45	23
Notice of appeal .....	47	24
Assignment of errors .....	48	25
Clerk's certificate .....	50	25





1 UNITED STATES OF AMERICA, ss:

The President of the United States to Wong Kim Ark and his attorneys, T. D. Riordan, esq., Joseph Napthaly, esq., and Messrs. Napthaly, Friedenrich & Ackerman, greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the ninth day of March next, pursuant to an appeal taken, allowed, and filed in the clerk's office of the district court of the United States for the northern district of California, wherein The United States of America is appellant and Wong Kim Ark is respondent, and you are to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, judge of the United States district court for the northern district of California, this 16th day of January, A. D. 1896.

WM. W. MORROW,  
*United States District Judge Northern District of California.*

2 Service of a copy of the within citation admitted this 18th day of January, 1896.

THOS. D. RIORDAN,  
*Attorney for Petitioner.*  
JOSEPH NAPTHALY,  
*Atty. for Petitioner.*

(Indorsed:) No. 11198. District court of the United States, northern district of California. In re Wong Kim Ark, on habeas corpus. Citation. Service of the within citation by copy admitted, this 17th day of January, 1896. Napthaly, Friedenrich & Ackerman, attorneys for petitioner. Filed January 18, 1896. Southard Hoffman, clerk. By , deputy clerk. Henry S. Foote, United States attorney northern district of California, U. S. Appraisers' Building, Room 61.

3 In the district court of the United States in and for the northern district of California. In the matter of the application of Wong Kim Ark for a writ of habeas corpus.

To the Honorable W. W. MORROW,  
*Judge of the District Court of the United States  
in and for the Northern District of California:*

The petition of Hoo Lung Suey respectfully shows:

That he is a friend of said Wong Kim Ark. That said Wong Kim Ark is imprisoned, detained, confined, and restrained of his liberty by John H. Wise, collector of customs at the port of San Francisco, and the captain of the steamship "Peking." That said imprisonment, confinement, detention, and restraint are illegal, and that the illegality thereof consists in this, to wit: That said Wong Kim Ark is over the age of twenty-one years, was born in the city and county of San Francisco,

State of California, at number 751 Sacramento st., in said city and county, in the year 1870, and is a citizen of the United States of America. That his father's name is Wong Si Ping and his mother's name is Wee Lee. That in the latter part of the year 1894 he departed from the port of San Francisco for China, with intention to return. That he returned to the port of San Francisco from China on the steamer "Coptic" on the            day of August, 1895, and was about to land, when he was prevented from so landing by said John H. Wise, collector of customs as aforesaid, who directed the captain of said vessel to detain him on board of said vessel, and he was so detained on said vessel until its departure from said port of San Francisco. That upon the departure of said vessel "Coptic," said John H. Wise, collector of customs as aforesaid, caused said Wong Kim Ark to be taken from said steamer "Coptic" and placed upon the steamer "Gaelic," and thereafter caused him to be placed on the steamer "Peking," and acting under the directions of said John H. Wise, collector of customs as aforesaid, said captain of said steamer "Peking" imprisons, detains, and confines said Wong Kim Ark on board of said vessel and refuses him permission to land. That said collector of customs and said captain of said vessel restrain said Wong Kim Ark from landing for the reason, as they allege, that although said Wong Kim Ark is a native born, that he is not a citizen of the United States; and they allege that, although he is a native born, he is not entitled to come into the United States because he is a laborer and of the Mongolian race.

And your petitioner respectfully denies such claim of said collector of customs and of said captain, and asserts that as said Wong Kim Ark is a native-born citizen of the United States he is entitled to enter the United States, and is entitled to land at the port of San Francisco, and is not affected by any act of Congress relating to the coming into the United States of persons of the Mongolian race; and that said collector of customs has no right to prohibit his landing.

Wherefore petitioner prays that a writ of habeas corpus may be granted, directed to said John H. Wise, collector of customs aforesaid, and to the captain of the steamer "Peking," commanding them and each of them to have the body of said Wong Kim Ark before your honor, at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning said Wong Kim Ark, together with the time and cause of his detention, and that he may thereupon be restored to his liberty.

(Signature in Chinese) HOO LUNG SUEY,  
*Petitioner.*

NAPTHALY, FREIDENRICH & ACKERMAN, *Attorneys,*  
426 California st., San Francisco, Cal.

UNITED STATES OF AMERICA,  
*District of California, ss:*

Hoo Lung Suey, being duly sworn, deposes and says: That he is the petitioner herein who subscribed the foregoing petition; that he has heard read the said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein states on his

information and belief, and as to those matters he verily believes it to be true. That he is a member of the firm of Ying Chung, No. 826 Clay st.

HOO LUNG SUEY. (Signature in Chinese.)

Subscribed and sworn to before me this 1st day of October, 1895.

JOHN FOUGA,

*Commissioner U. S. Circuit Court, Northern District of California.*

Let the writ of habeas corpus issue pursuant to the prayer of the petition, returnable forthwith.

Oct. 2, 1895.

WM. W. MORROW,

*United States District Judge Northern District of California.*

(Endorsed:) Filed Oct. 2nd, 1895. Southard Hoffman, clerk. By J. S. Manley, deputy clerk.

6 In the district court of the United States, northern district of California. In the matter of Wong Kim Ark. On habeas corpus. No. 11198.

The President of the United States of America to master of the steamship "Peking," greeting:

You are hereby commanded that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable Wm. W. Morrow, judge of the district court of the United States for the northern district of California, at the court room of said court, in the city and county of San Francisco, California, on the 2nd day of Oct., 1895, at o'clock, a. m., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness, the Honorable Wm. M. Morrow, judge of the said district court, and the seal thereof, at San Francisco, in said district, on the 2nd day of Oct., A. D., 1895.

[SEAL.]

SOUTHARD HOFFMAN,

*Clerk of said District Court.*

By J. S. MANLEY,

*Deputy Clerk.*

61 $\frac{1}{2}$  In obedience to the within writ, I hereby produce the body of Wong Kim Ark, as within directed, and return that I hold the said person in my custody by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese restriction act.

DAN'L FRIELE, *Master.*

Dated San Francisco, Cal., Nov. 7, 1895.

(Indorsed:) No. 11198. District court of the United States, northern district of California. In the matter of Wong Kim Ark, on habeas corpus. Ex "Coptic," ticket 24. S. S. ticket No. . Writ of habeas corpus and return thereto, (Endorsed:) Issued Oct. 2nd, 1895. Returnable Oct.

2nd, 1895. Filed on return this 7th day of October, 1895. Southard Hoffman, clerk of said U. S. district court. By J. S. Manley, deputy clerk.

7 In the district court of the United States, northern district of California. In the matter of Wong Kim Ark. On habeas corpus. No. 11198.

The President of the United States of America to master of the steamship "Peking," greeting:

You are hereby commanded that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable Wm. W. Morrow, judge of the district court of the United States for the northern district of California, at the court room of said court, in the city and county of San Francisco, California, on the 2nd day of Oct., 1895, at o'clock a. m., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness, the Honorable Wm. W. Morrow, judge of the said district court, and the seal thereof, at San Francisco, in said district, on the 2nd day of October, A. D. 1895.

[SEAL.]

SOUTHARD HOFFMAN,

*Clerk of said District Court.*

By J. S. MANLEY,

*Deputy Clerk.*

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a copy of the writ of habeas corpus issued in the within entitled matter.

Attest my hand and seal of said district court this 2nd day of October, A. D. 1895.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*

By J. S. MANLEY, *Deputy Clerk.*

I hereby certify that on the 6th day of November, 1895, I received the writ of which the within is a copy, and that on the 6th day of November, 1895, at San Francisco, in this district, I personally served the said writ by delivering to and leaving the same with the captain of the S. S. "Peru."

Dated San Francisco, Cal., November 6th, 1895.

BARRY BALDWIN, *U. S. Marshal.*

By S. P. MONCKTON, *Deputy Marshal.*

(Indorsed:) No. 11198. District court of the United States, northern district of California. In the matter of Wong Kim Ark. On habeas corpus. S. S. ticket No. . Marshal's return of service of writ of habeas corpus. (Endorsed:) Issued Oct. 2nd, 1895. Returnable Oct. 2nd, 1895. Filed on return this 6th day of November, 1895. Southard Hoffman, clerk of said U. S. district court. By J. S. Manley, deputy clerk.

8 At a stated term of the district court of the United States of America for the northern district of California, held at the court room, in the city of San Francisco, on Thursday, the 7th day of November, in the year of our Lord one thousand eight hundred and ninety-five. Present, the Honorable Wm. W. Morrow, judge.

In re Wong Kim Ark. On habeas corpus. No. 11198.

In this case the detained being produced in open court in obedience to the writ issued herein, on motion of H. S. Foote, esq., U. S. attorney, it is ordered that the said Wong Kim Ark be committed to the custody of the U. S. marshal to await hearing. And by agreement of Mr. Foote and Joseph Naphtaly, esq., atty. for petr., it is ordered that the hearing hereof be, and the same is hereby, continued until, and set for, Monday, November 11th, 1895, at 10 o'clock a. m.

9 In the district court of the United States in and for the northern district of California. In the matter of Wong Kim Ark. On habeas corpus. No. 11198.

The above-named party having been produced in obedience to the writ of habeas corpus issued herein

It is ordered that said party be committed to the custody of the United States marshal for this district until the further order of the court.

WM. W. MORROW, *Judge*.

Dated Nov. 7th, 1895.

*Marshal's return.*

UNITED STATES MARSHAL'S OFFICE,  
NORTHERN DISTRICT OF CALIFORNIA.

The within warrant of commitment was received by me on the 7th day of November, A. D. 1895, and is returned executed this 11th day of November, A. D. 1895.

BARRY BALDWIN, *U. S. Marshal*.

By J. D. HARRIS, *Deputy Marshal*.

SAN FRANCISCO, CAL., Nov. 11th, 1895.

(Indorsed:) No. 11198. U. S. district court, northern district of California. In the matter of Wong Kim Ark. On habeas corpus. Commitment. (Endorsed:) Returned and filed this 11th day of Nov., A. D. 1895. Southard Hoffman, clerk. By , deputy clerk.

10 In the district court of the United States in and for the northern district of California. In the matter of the application of Wong Kim Ark for a writ of habeas corpus.

*To the Honorable the District Court of the United States in and for the Northern District of California :*

The petition of respectfully shows :

I.

That Wong Kim Ark is unlawfully imprisoned, detained, confined, and restrained of his liberty by John H. Wise, collector of customs at

the port of San Francisco, and D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company, acting under his direction, in the city and county of San Francisco, State of California,

## II.

And your petitioner respectfully further shows that the father and mother of Wong Kim Ark, namely, Wong Si Ping and Wee Lee, were in the year 1873, and for a long time prior thereto, and more especially at the date of the birth of said Wong Kim Ark, at the time and place hereinafter specified, domiciled residents of the United States, and had therein a continued, established, and permanent residence in the city and county of San Francisco, State of California, in the northern district of California; and prior to the time aforesaid had come to the United States under and in pursuance of the invitation extended to them, and at that time to all other persons of the Chinese race, under the provisions of the treaty between the United States of America and the Ta Sing  
 11 Empire, of the 18th day of June, 1858, and the additional articles thereto, concluded and signed on the 28th of July, 1868 (Burlingame treaty), which then and there declared that the high contracting parties "cordially recognized the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and immigration of their citizens and subjects, respectively, from the one country to the other, for the purpose of curiosity, of trade, or as permanent residents;" and further declared that "Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to residence as may there be enjoyed by the citizens or subjects of the most-favored nation."

## III.

That the said mother and father of said Wong Kim Ark continued to have, enjoy, and maintain their said residence in the United States at said city and county of San Francisco in said State of California, as hereinbefore recited, until the year 1890, when they departed for China, as hereinafter stated.

## IV.

That the said mother and father of said Wong Kim Ark are and were at all the times herein mentioned or referred to, persons of Chinese descent and subjects of the Emperor of China.

## V.

That during the said residence of the said mother and father of said Wong Kim Ark in the said city and county of San Francisco, State of California, aforesaid, and more especially at No. 751 Sacramento street, in said city and county of San Francisco, State of California, in the  
 12 year 1873, the said Wong Kim Ark was born at the said No. 751 Sacramento street, in said city and county of San Francisco and State aforesaid.

## VI.

That during the residence aforesaid of the said mother and father of said Wong Kim Ark within the United States as aforesaid, his said parents were not engaged in any diplomatic or official capacity under the Emperor of China, but were engaged only in the prosecution of business.

## VII.

That the said Wong Kim Ark was born within the dominion, power, protection, and obedience of the United States and subject to the jurisdiction thereof, and he has always subjected himself to the jurisdiction and dominion of the United States and yielded to the said United States direct and immediate allegiance, and has been taxed, recognized, and treated as a citizen of the United States; and that he has never lost his said nationality as a citizen of the United States, or lost or renounced his allegiance thereto, or his said citizenship, either by expatriation or change of residence or oath of allegiance or in any other manner whatsoever or at all.

## VII.

That in the year 1890 the said father and mother of said Wong Kim Ark departed for China; that the same year, namely 1890, said Wong Kim Ark departed to China upon a temporary visit, and that it was his intention and the intention of the father and mother of said Wong Kim Ark that he, the said Wong Kim Ark, would return to this country; and he did return to the United States on the 26th day of July, 1890, by the steamship "Gaelic," and was permitted to land at the port of  
 13 San Francisco by the collector of customs of said port upon the sole ground that he was a person born in the United States and subject to the jurisdiction thereof and a citizen of the United States.

## IX.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore averred, he has had but one residence, to wit, a residence at said city and county of San Francisco, in said State of California, and within the dominion and jurisdiction of the United States, and that he has never changed or lost said residence, or gained or acquired another residence.

## X.

That from and after the date last aforesaid of the return of said Wong Kim Ark to the United States until the year 1894, he has continued to reside and remain within the United States as a citizen thereof, and that in the year 1894 he again departed for China upon a temporary visit, with the intention of returning to the United States, and did return from China to the United States on the steamship "Coptic" on the       day of August, 1895, and applied to the collector of customs of the port of San Francisco to be permitted to land, and said application was denied.



## XI.

That said Wong Kim Ark is detained and restrained of his liberty by, and in the custody of, John H. Wise, collector of customs at the port of San Francisco, and D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company, acting under direction of said collector of customs, and under and by color of the authority of the United States, unlawfully and wrongfully, as petitioner is informed and verily believes, and in violation of the provisions of the Constitution of the United States and of the laws thereof, and especially in violation of the fifth amendment of the Constitution of the United States, that no person shall be deprived of liberty without due process of law.

## XIII.

That said Wong Kim Ark is not detained by virtue of any judgment, order, or decree, or other judicial proceeding of any court, and that he is now detained only and solely by virtue of the pretended claim of the said John H. Wise, collector of customs at said port of San Francisco; that although born as aforesaid within the said United States, the said Wong Kim Ark is not a citizen of the United States, and that he is not detained or restrained in custody upon any other ground or for any other reason.

## XIII.

That as petitioner is informed and verily believes, the detention of said Wong Kim Ark by the said John H. Wise, as collector of customs aforesaid, and the said D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company, acting under direction of said collector of customs, is without jurisdiction, and that said Wong Kim Ark is restrained of his liberty without due process of law and against his rights under the Constitution of the United States and the laws thereof; that the acts of the Congress of the United States restricting and excluding the immigration of Chinese to the United States are not applicable to the said Wong Kim Ark, he being a citizen of the United States, and that the said Wong Kim Ark has never done or committed any act or thing whatsoever to exclude him from said United States, and that his said exclusion, detention, and custody are wholly without warrant or authority of law.

Wherefore, petitioner prays that the writ of habeas corpus may be granted, directed to said John H. Wise, collector of customs at the port of San Francisco, and said D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company, commanding them and each of them to have the body of said Wong Kim Ark before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of his detention, and that he may be restored to his liberty.

WONG KIM ARK, *Petitioner.*

NAPHTHALY, FREIDENRICH & ACKERMAN and  
THOS. D. RIORDAN,

*Attorneys for Petitioner.*



UNITED STATES OF AMERICA,

*State of California, City and County of San Francisco:*

Wong Kim Ark, being duly sworn, deposes and says on oath:

That he is the petitioner named in the foregoing petition; that he has heard read said petition, and knows the contents thereof; that the same is true of his own knowledge, and except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

WONG KIM ARK.

Subscribed and sworn to before me this 11th day of November, 1895.

J. S. MANLEY,

*Commissioner U. S. Circuit Court, Northern District of California.*

(Endorsed:) Filed November 11th, 1895. Southard Hoffman, clerk.

By J. S. Manley, deputy clerk.

16 United States district court, northern district of California. In the matter of the application of Wong Kim Ark for writ of habeas corpus. No. 11198.

To the Honorable W. W. MORROW,

*District Judge:*

And now comes Henry S. Foote, esq., United States attorney for the northern district of California, and asks for leave to intervene for and on behalf of the United States in the matter of the application made on behalf of Wong Kim Ark for a writ of habeas corpus, and respectfully make opposition to said writ, and for grounds of intervention states as follows:

That, as he is informed and believes, the said person in whose behalf said application was made is not entitled to land in the United States, or to be or remain therein, as is alleged in said application, or otherwise.

Because the said Wong Kim Ark, although born in the city and county of San Francisco, State of California, United States of America, is not, under the laws of the State of California and of the United States, a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons and subjects of the Emperor of China, and the said Wong Kim Ark being also a Chinese person and a subject of the Emperor of China.

Because the said Wong Kim Ark has been at all times, by reason of his race, language, color, and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation.

17 That the said Wong Kim Ark is not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of Congress, known as the Chinese exclusion acts, which would exempt him from the class or classes which are especially excluded from the United States by the provisions of the said acts.

Wherefore the said United States attorney asks that a judgment and order of this honorable court be made and entered in accordance with the allegations herein contained, and that the said Wong Kim Ark be

detained on board of said vessel until released as provided by law, or otherwise, to be returned to the country from whence he came, and that such further order be made as to the court may seem proper and legal on the premises.

Dated at San Francisco, California, this 11th day of November, 1895.

H. S. FOOTE, *United States Attorney.*

(Endorsed:) Filed November 11th, 1895. Southard Hoffman, clerk.  
By J. S. Manley, deputy clerk.

8 United States district court, northern district of California. In the matter of the application of Wong Kim Ark for a writ of habeas corpus.

It is hereby stipulated and agreed that the following are the facts in the above-entitled matter, and on which said facts the said matter shall be submitted for decision:

### I.

That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento street, in the city and county of San Francisco, State of California, United States of America, and that his mother and father were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

### II.

That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile and residence therein at said city and county of San Francisco, State aforesaid.

### III.

That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

### IV.

That during all the time of their said residence in the United States as domiciled residents therein the said mother and father of said  
9 Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

### V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

## VI.

That in the year 1890 the said Wonk Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on the 26th day of July, 1890, on the steamship "Gaelic," and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States.

## VII.

That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

## VIII.

That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

NAPHTALY, FREDENRICK & ACKERMAN and  
THOS. D. RIORDAN,

*Att'ys for Pet'n'r.*

H. S. FOOTE,  
*U. S. Dist. Att'y, Northern Dist. of Cal.*

(Endorsed:) Filed November 11th, 1895. Southard Hoffman, clerk.  
By J. S. Manley, deputy clerk.

At a stated term of the district court of the United States of America for the northern district of California, held at the court room, in the city of San Francisco, on Monday, the 11th day of November, in the year of our Lord one thousand eight hundred and ninety-five. Present, the Honorable Wm. W. Morrow, judge.

In re Wong Kim Ark. On habeas corpus. No. 11198.

This matter this day came on regularly for hearing, Thos. D. Riordan, esq., and Joseph Naphhtaly, esq., appearing as attorneys for the petitioner, and H. S. Foote, esq., U. S. attorney, and Bert Schlesinger, esq., assistant U. S. attorney, appearing on behalf of the United States. On motion of Mr. Riordan, it is ordered that the petitioner be, and he hereby is, allowed to file an amended petition. An agreed statement of facts was thereupon filed and the matter argued by Mr. Foote, Mr. Riordan, and Mr. Naphhtaly, and submitted to the court for consideration and decision on brief to be filed two and two.

22 In the district court of the United States in and for the northern district of California. In the matter of Wong Kim Ark. On habeas corpus. No. 11198.

*Opinion, rendered January 3rd, 1896.*

Petition for a writ of habeas corpus. Petition granted and petitioner, Wong Kim Ark, discharged.

Thos. D. Riordan, esq., and Napthaly, Freidenrich & Ackerman, attorneys for petitioner.

H. S. Foote, esq., U. S. district attorney, and Geo. D. Collins, esq., as amicus curiae, appearing for the United States.

MORROW, district judge:

A petition for a writ of habeas corpus was filed on behalf of Wong Kim Ark, alleging that said Wong Kim Ark is unlawfully confined and restrained of his liberty on board of the steamship "Coptic" and prevented from landing into the United States by John H. Wise, collector of customs at the port of San Francisco, and D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company, acting under his authority. It is averred, further, that Wong Kim Ark has the right to enter the United States because he was born within the United States and is a citizen thereof. The district attorney has intervened on behalf of the United States and objects to the discharge of Wong Kim Ark upon the ground that although born within the United States he is not, under

23 the laws of the United States, a citizen thereof, for the reason that his father and mother were at the time of his birth, and now are, Chinese persons and subjects of the Emperor of China, and that, therefore, Wong Kim Ark is also a Chinese person and a subject of the Emperor of China; that he is a Chinese laborer, and not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of Congress known as the Chinese exclusion acts which would exempt him from the class or classes which are specially excluded from the United States by the provisions of said acts. An amended petition has been filed in which the detained himself petitions the court for a writ to test the legality of his detention. The amended petition sets out the facts of petitioner's detention and his right to enter this country as a citizen thereof more in detail than does the original petition; otherwise, both are substantially the same. An agreed statement of facts has been filed, which is as follows:

# I.

That the said Wong Kim Ark was born in the year 1873 at No. 751 Sacramento street, in the city and county of San Francisco, State of California, United States of America, and that his mother and father were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

## II.

That at the time of his said birth, his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile and residence therein at said city and county of San Francisco, State aforesaid.

## III.

24 That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

## IV.

That during all the time of their said residence in the United States, as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

## V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

## VI.

That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on the 26th day of July, 1890, on the steamship "Gaelic," and was permitted to enter the United States by the collector of customs, upon the sole ground that he was a native-born citizen of the United States.

## VII.

25 That after his said return, the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

## VIII.

That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

The question to be determined is whether a person born within the United States, whose father and mother were both persons of Chinese descent and subjects of the Emperor of China, but at the time of the birth were both domiciled residents of the United States, is a citizen within the meaning of that part of the 14th amendment of the Constitution, which provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."

The district attorney was assisted by Mr. George D. Collins, of the San Francisco bar, who appeared in the matter as *amicus curiæ*. Mr. Collins's position upon this question has been known for some time and his views have been expressed in able and interesting articles in the *American Law Review* (vol. 18, 831; vol. 29, 385). He maintains that the doctrine of international law as to citizenship exists in the United States, and not that of the common law; that the citizenship clause of the 14th amendment is in consonance with the international rule and should be so interpreted; and that, therefore, birth within the United States does not confer the right of citizenship. His views have been repeated and elaborated in his brief with much reasoning and plausibility. It is contended, on the part of the United States, that the words,

26 "subject to the jurisdiction thereof," mean subject to the political jurisdiction of the United States; that is to say, that the petitioner,

Wong Kim Ark, though born within the United States, was not born subject to the political jurisdiction of the General Government, for the reason that his father and mother were and are Chinese subjects, and that, according to the rule of international law, the political status of the child follows that of the father, and that of the mother, when the child is illegitimate. It is urged, therefore, that the mere fact of birth in this country does not, *ipso facto*, confer any right of citizenship. The position contended for assumes, practically, that the provision *for* the 14th amendment under consideration intends to follow and adopt the rule of international law. In support of this view, the remarks of Mr. Justice Story, in *Shanks v. Dupont* (3 Peters, 243, 247), are cited, to the effect that "Political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations." It is contended, further, that the common-law doctrine does not govern the determination of the question of citizenship, for the reason that there is no common law proper of the United States, citing *Wheaton v. Peters* (8 Peters, 658), *Kendall v. United States* (12 Peters, 524), *Loman et al. v. Clarke* (2 McLean, 568), *United States v. The New Bedford Bridge* (1 Wood. & M., 401); *People v. Folsom* (5 Cal., 373; *In re Barry* (42 Fed. R., 113). Finally, it is maintained that the United States Supreme Court, in interpreting the first clause of the 14th amendment, now in question, in the *Slaughter-house Cases* (16 Wal. 36), adopted, to all intents and purposes, the rule of international law when it said through Mr. Justice Miller, "The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." The interpretation, by the Supreme Court, in the case of *Elk v. Wilkins* (112 U. S., 102) of this same phrase is also cited in support of the contention made in favor of the rule of international law.

On the other hand, counsel for petitioner contend that what the Supreme Court said in the Slaughterhouse cases, *supra*, is but mere dictum, and that, outside of a few scattered observations of this character, that tribunal has never directly passed upon the question presented for decision in this matter, viz, whether a person born in this country of foreign parents is a citizen. But it is claimed that that question has been adjudicated in this circuit in two cases, and that the law, as there expounded, is in favor of the citizenship of the petitioner, and, being the law of this circuit, is controlling upon this court. The first of these, and the one which is principally relied on, is *In re Look Tin Sing*, to be found reported in 10 Sawyer, 353, and decided in 1884. The second is the case of *Gee Fook Sing v. United States*, reported in 49 Fed. R., 146; s. c. 7 U. S. App., 27; s. c. 1 C. C. A. (9th cir.) 34. The last case is a decision of the circuit court of appeals for this circuit (9th) rendered in 1892, which reaches the same conclusion as did the circuit court *In re Look Tin Sing*. The case of *Lynch v. Clarke* (1 Sandf., 583), a decision rendered in 1844 and before the adoption of the 14th amendment, by Hon. Lewis H. Sandford, assistant vice-chancellor of the 1st circuit of the court of chancery of the State of New York, was also pressed upon the attention of the court, as authority showing that it was the common-law doctrine of citizenship, and not that of the law of nations, which had been

28 recognized in this country previous to the adoption of the 14th amendment. While the two decisions rendered in this circuit would seem, upon the principle of *stare decisis*, to be conclusive upon the question raised here and controlling on this court, yet, in view of the fact that it has been argued on the part of the Government, and very forcibly, that the Supreme Court laid down, in the Slaughterhouse cases, a doctrine at variance with that announced in these decisions and, as claimed, in consonance with that of the law of nations, it will be necessary to examine these cases with care and at some length. The question is an important one, not alone from an abstract point of view, but because of the consequences a decision unfavorable to the petitioner would involve. For, if the contention of counsel for the Government be correct, it will inevitably result that thousands of persons of both sexes who have been heretofore considered as citizens of the United States, and have always been treated as such, will be, to all intents and purposes, denationalized and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens and whose right as such is not and never has been questioned, because birth within the country seems to have been recognized generally as conclusive upon the question of citizenship. But the Supreme Court has never squarely determined, either prior or subsequent to the adoption of the 14th amendment in 1868, the political status of children born here of foreign parents. In the case of *Minor v. Happersett* (21 Wall., 168), the court expressly declined to pass upon that question. Nor was there any definition in the Constitution or in the acts of Congress of what constituted citizenship until the adoption of the 14th amendment.

29 At the common law, if the parent be under the actual obedience of the King and the place of the child's birth be within the King's obedience as well as in the dominion, the child becomes a subject



of the realm; in other words, birth within the realm was deemed conclusive. This was decided in *Calven's Case*, reported by Lord Coke (7 Co., 1), and has always been recognized as the common-law doctrine. (1 Black. Com., 366; 2 Kent Com., 9; *Lynch v. Clarke*, 1 Sandf. Ch., 583; *U. S. v. Rhodes*, 1 Abbott's U. S. Rep., 28.)

By the law of nations, birth follows the political status of the father, and of the mother when the child is illegitimate. (Bar's Int. Law, sec. 31; Vattel, secs. 212-215; Savigny on Int. Law, sec. 351.)

The 14th amendment to the Constitution of the United States must be controlling upon the question presented for decision in this matter, irrespective of what the common law or international doctrine is. But the interpretation thereof is undoubtedly confused and complicated by the existence of these two doctrines, in view of the ambiguous and uncertain character of the qualifying phrase, "subject to the jurisdiction thereof," which renders it a debatable question as to which rule the provision was intended to declare. Whatever of doubt there may be is with respect to the meaning of that phrase. Does it mean subject to the laws of the United States, comprehending in the expression the allegiance that aliens owe in a foreign country to obey its laws, or does it signify to be subject to the political jurisdiction of the United States, in the sense that is contended for on the part of the Government? This question was ably and thoroughly considered in *re Look Tin Sing*, supra,

where it was held that it meant subject to the laws of the United States. Mr. Justice Field, sitting as circuit judge, delivered the opinion, which was concurred in by Judge Sawyer and Sabin. There is a note to the opinion stating that "Judge Hoffman did not sit on the hearing of this case, but he was on the bench when the opinion was delivered, and concurred in the views expressed." The opinion discusses and decides the precise question involved in the case at bar. There, as here, a person of Chinese descent, born in the United States, but whose parents had always been subjects of the Emperor of China, claimed the right to land in the United States by virtue of his right as a citizen thereof and, as such citizen, to be unaffected by any of the Chinese exclusion acts. The court held that, although born here of parents who were subjects of the Emperor of China, he was a citizen within the meaning of the 14th amendment; and that, though he was without the certificate required by the Chinese exclusion acts of 1882 or of 1884, being a citizen, he could not be prevented from returning to his country. The similarity of the essential facts between that case and the one at bar is obvious from the recital contained in the opinion, which is as follows:

"The petitioner belongs to the Chinese race, but he was born in Mendocino, in the State of California, in 1870. In 1879 he went to China, and returned to the Port of San Francisco during the present month (September, 1884) and now seeks to land, claiming the right to do so as a natural born citizen of the United States. It is admitted by an agreed statement of facts that his parents are now residing in Mendocino, in California, and have resided there for the last twenty years; that they are of the Chinese race, and have always been subject to the Emperor of China; that his father sent the petitioner to China, but with the intention that he should return to this country; that the father is a merchant at Mendocino, and is not here in any diplomatic or other



official capacity under the Emperor of China. The petitioner is without any certificate, under the act of 1882, or of 1884, and the district attorney of the United States, intervening for the Government, objects to his landing for the want of such certificate." The learned justice then continues: "The first section of the fourteenth amendment to the Constitution declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.' This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words 'subject to the jurisdiction thereof.' They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them, when obedience can be rendered; and only those subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign Governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their country. This extraterritoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. Person born on a public vessel of a

foreign country, whilst within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted.

They are considered as born in the country to which the vessel belongs. In the case of public law, they are not born within the jurisdiction of the United States. The language used has also a more extended purpose. It was designed from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our Government, and thus dissolved their political connection with the country. The United States recognized the right of everyone to expatriate himself and choose another country." The court then proceeds as follows:

"With this explanation of the meaning of the words in the fourteenth amendment, 'subject to the jurisdiction thereof,' it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship, and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country." After adverting to the subjects of the citizenship clause of the 14th amendment, and to the fact that one of the purposes of its enactment was to overturn the doctrine enunciated in the Dred Scot case, the opinion continues: "Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by Assistant Vice-Chancellor Sandford in *Lynch v. Clarke*, found in the first volume of his reports (1 Sandf., 583). In that case one Julia Lynch, born in New York, in 1819, of alien parents, during their temporary sojourn in that city, returned with them the same year to

33 their native country, and always resided there afterwards. It was held that she was a citizen of the United States. After an exhaustive examination of the law, the vice-chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen, and added that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding, he mentions the fact that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country, the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his parents were citizens or foreigners; it is enough that he was born here, whatever was the status of his parents. He shows also that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of the States, and establishes conclusively that there is on this subject a concurrence of legislative declaration with judicial opinion, and that both accord with the general understanding of the profession and of the public." The opinion concludes as follows: "As to the position of the district attorney that the restriction act prevents the reentry of the petitioner into the United States, even if he be a citizen, only a word is necessary. \* \* \* Being a citizen, the law could not intend that he should ever look to the Government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws and beyond the power of Congress. The petitioner must be allowed to land, and it is so ordered."

34 In 1892 the question was again passed upon; this time by the circuit court of appeals for this circuit (9th), in the case of *Gee Fook Sing v. United States*, supra. *Gee Fook Sing*, the appellant, had sued for a writ of habeas corpus in the court below (district court for the northern district of California), claiming that he was illegally restrained of his liberty and imprisoned on board the steamship "Belgie," at the port of San Francisco, by the master of the vessel, on the ground that he was a Chinese person prohibited by law from entering into this country. The appellant contended that he was a citizen of this country and was not prohibited, therefore, from entering into the United States. The lower court found, upon the evidence adduced, that *Gee Fook Sing* had not established to its satisfaction that he had been born here and remanded him. This judgment was affirmed by the circuit court of appeals. The court was composed of Judges Deady, Hanford, and Hawley, and the opinion was delivered by Judge Hanford. The case was submitted upon the record without argument. In the course of the opinion, which was quite short, the court simply stated its conclusions upon the identical question presented here for decision, as follows: "We have considered all the questions of law and fact which we find involved, and our conclusions are: That, inasmuch as the fourteenth amendment to the Constitution of the United States declares that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, the laws excluding emigrants who

are Chinese laborers are inapplicable to a person born in this country and subject to the jurisdiction of its Government, even though his  
 35 parents were not citizens nor entitled to become citizens under the laws providing for the naturalization of aliens; that any person alleging himself to be a citizen of the United States and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who on that ground applies to any United States court for a writ of habeas corpus, is entitled to have a hearing and a judicial determination of the facts so alleged, and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination."

The authority of *In re Look Tin Sing* is not referred to by the court, nor, in fact, are any authorities cited or a discussion of the question indulged in; but it is safe to assume that Mr. Justice Field's decision was considered and followed. In 1888, Judge Deady, sitting in the circuit court for the district of Oregon, reached the same conclusion in the case of *In re Chin King et al.* (13 Saw., 333). He cites *In re Look Tin Sing* (supra) and *Lynch v. Clarke* (supra), and holds that the citizenship clause of the 14th amendment is but declaratory of the common-law doctrine. It is clear that these decisions, the one rendered in the circuit court of appeals and the other rendered in the circuit court of this district, determining, as they do, the identical question mooted in the case at bar, are conclusive and controlling upon this court, unless the Supreme Court of the United States has directly and authoritatively, and not by way of dictum, announced and laid down a doctrine at variance with that expounded in the cases in this circuit. The decisions of the Supreme Court, upon all questions necessarily involved in the cause determined, must be paramount, as binding authority on this court, to that of  
 36 any other tribunal in the land. The circuit court of appeals act (March 3, 1891, 26 Stat. L., 826) has in no wise impaired or diminished the jurisdiction of the Supreme Court over "any case that involves the construction or application of the Constitution of the United States."

But as it has been argued, and very plausibly, by counsel for the United States that the Supreme Court has laid down a different doctrine in the so-called Slaughterhouse cases (16 Wall., 36), it will be necessary to examine critically the propositions involved in these cases and the language of the court as contained in the prevailing opinion. The Slaughterhouse cases were decided in 1873, and the opinion was delivered by Mr. Justice Miller. In the decision most of the provisions of the 13th, 14th, and 15th amendments to the Constitution received clear, elaborate, and able interpretation and construction. The main question at issue was as to whether or not the legislature of the State of Louisiana could grant exclusive right or privilege for 25 years to a corporation created by it, to have and maintain slaughterhouses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson, and St. Bernard, in that State, and prohibiting all other persons from building, keeping, or having slaughterhouses, landings for cattle, and yards for cattle intended for sale or slaughter within those limits, and requiring that all cattle or other animals intended for sale or slaughter in that district should be brought to the yards and

slaughterhouses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore, and entrails, except of swine. It was held that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged and imposing the duty of providing ample conveniences with permission to all owners of stock to land and of all butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required) within the power of the State legislature, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment; and, further, that such power was not forbidden by the thirteenth article of amendment and by the first clause of the fourteenth article.

While the question of citizenship under the 14th amendment arose, yet it was in subordination to the main issue, and was necessary to the decision of the court only in so far as it related to an interpretation of the second clause of the 14th amendment, as to whether the exclusive privileges granted by the State of Louisiana abridged any of the privileges and immunities of the citizens of the United States. It was in this connection that the further question arose as to who were citizens of the United States under the 14th amendment, and it was held that this provision protects from the hostile legislation of the States the privilege and immunities of citizens of the United States, as distinguished from those of citizens of the States. But the question which is here directly involved did not arise in that case, nor did the interpretation of the court relate to such a state of facts as exist here. Obviously, therefore, what the court then said with reference to the status of children born here of foreign parents is but obiter dictum. This will be evident by a reference to that part of the opinion which contains the language claimed to be a recognition of the international doctrine on the subject. "The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the Executive Departments, and in the public journals. It has been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States comprising the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still not

only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution. To remove this difficulty, primarily, and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the

39 first section was framed. \* \* \* The first observation we have to make on this first clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."

That this last sentence, which is the expression relied on by counsel for the Government, is mere dictum is plain from what has been stated as the issue involved in those cases. That being so, the observations referred to and relied upon, however persuasive they may appear to be, can not be accepted as declaring the law in this circuit, at least as against the authority of *In re Look Tin Sing*, where the question was squarely met and decisively settled. But it is to be observed that the Supreme Court, immediately succeeding the remarks just quoted, used the following significant language: "The next observation is more important, in view of the argument of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter.

40 He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

Nor does the interpretation of the phrase in question in the case of *Elk v. Wilkins* (112 U. S., 94) dispose of the matter. There the question was whether an Indian, born within the United States and who had severed his tribal relations, was a citizen of the United States within the meaning of the 14th amendment, Mr. Justice Gray, delivering the opinion of the court, said: "This section contemplates two sources of citizenship, and two sources only—birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States and subject to the jurisdiction thereof.' The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth can not become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which

foreign territory is acquired. Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign Government born within the domain of the Government, or the children born within the United States, of ambassadors or other public ministers of foreign nations." In the case of the *United States v. Rhodes* (1 Abbott's U. S. Rep., 28, 40) it is held that the common-law rule as to citizenship is the law of this country. This decision was made in 1866 in the circuit court for the district of Kentucky. This was about the time when the 14th amendment was first proposed to the several States for their adoption, although it was not formally adopted as part of the Constitution until July 28th, 1868.

But it would be useless to encumber this already lengthy opinion with further argument and observation upon this interesting question. Arriving at the conclusion, as I do, after careful investigation and much consideration, that the Supreme Court has as yet announced no doctrine at variance with that contained in the *Look Tin Sing* decision and the other cases alluded to, I am constrained to follow the authority and law enunciated in this circuit. Counsel for the United States have argued with considerable force against the common-law rule and its recognition as being illogical and likely to lead to perplexing and perhaps serious international conflicts if followed in all cases; but these observations are obviously addressed to the policy of the rule and not to its interpretation. The doctrine of the law of nations, that the child follows the nationality of the parents, and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more logical, reasonable, and satisfactory, but such consideration will not justify this court in declaring it to be the law against controlling judicial authority. It may be that the Executive Departments of the Government are at liberty to follow this international rule in dealing with questions of citizenship which arises between this and other countries, but that fact does not establish the law for the courts in dealing with persons within our own territory. In this case the question to be determined is as to the political status and rights of Wong Kim Ark under the law in this country. No foreign power has intervened or appears to be concerned in the matter. From the law as announced and the facts as stipulated I am of opinion that Wong Kim Ark is a citizen of the United States within the meaning of the citizenship clause of the 14th amendment. He does not forfeit his right to return to this country. His detention, therefore, is illegal. He should be discharged, and it is so ordered.

(Endorsed:) Filed January 3rd, 1896. Southard Hoffman, clerk.

At a stated term of the district court of the United States of America for the northern district of California, held at the court room in the city of San Francisco on Friday, the 3rd day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present, the Honorable Wm. W. Morrow, judge.



## In re Wong Kim Ark. On habeas corpus. No. 11198.

This matter having been heretofore submitted to the court on an agreed statement of facts after argument of counsel for consideration and decision; now after due consideration had thereon, the court renders a written opinion. And by the court ordered that the said Wong Kim Ark be discharged. On motion of H. S. Foote, esq., United States attorney, it is ordered that an appeal to the Supreme Court of the United States be, and the same is hereby, granted. And on motion of Joseph Naphhtaly, esq., attorney for the petitioner, Mr. Foote consenting thereto, it is ordered that the said Wong Kim Ark be released from custody upon his giving his personal recognizance in the sum of two hundred and fifty dollars (\$250.00).

44 In the district court of the United States, northern district of California. In the matter of Wong Kim Ark. On habeas corpus. No. 11198.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the court now here ordered that the said named person, in whose behalf the writ of habeas corpus herein was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby, discharged.

Entered this 3rd day of January, 1896.

SOUTHARD HOFFMAN, *Clerk.*

By J. S. MANLEY, *Deputy Clerk.*

(Indorsed :) No. 11198. District court of the United States, northern district of California. In re Wong Kim Ark. On habeas corpus. Order of discharge. (Endorsed :) Filed January 3d, 1896. Southard Hoffman, clerk. By J. S. Manley, deputy clerk.

45 In the district court of the United States in and for the northern district of California. In the matter of the application of Wong Kim Ark for a writ of habeas corpus.

Whereas said Wong Kim Ark did heretofore present to said court his petition that he was deprived of his right to land at the port of San Francisco, United States of America, the court may enquired into the cause of his detention, and that on due hearing and enquiry he may be allowed to land at said port; and whereas after due hearing had the court made its order on the 3rd of Jan'y, 1896, directing that the U. S. marshal for the said district, in whose custody the said Wong Kim Ark then was and ever since the issuance of the said writ of habeas corpus, let the said Wong Kim Ark go, and that he had been unlawfully deprived of his right to land at said port; and whereas the district attorney of the United States for said district has appealed from the said decision of said district court to the Supreme Court of the United States of America; and whereas the said court has made an order that pending the appeal from said decision of said court to the Supreme Court of the United States of

America, and whereas the said court had made an order that pending the appeal from said decision of said court ordering the discharge of said Wong Kim Ark, he, said Wong Kim Ark, be enlarged upon recognizance in the sum of two hundred and fifty dollars; and whereas said court has further ordered that for special reasons existing in this matter sureties upon such recognizance should not be required. Now, therefore,

46 the said Wong Kim Ark is hereby firmly held and bound unto the people of the United States of America in the full sum of two hundred and fifty dollars, conditioned that if the Supreme Court of the United States shall reverse the decision of said district court upon the appeal so taken as aforesaid, and shall hold that the said Wong Kim Ark was not entitled to land at the port of San Francisco aforesaid, then said Wong Kim Ark will surrender himself into the custody of the proper officer representing the United States authorities, or in default thereof pay to the said, the United States of America, the said sum of two hundred and fifty dollars.

Dated this third of January, 1896.

WONG KIM ARK.

Witness :

J. NAPHTHALY.

Taken and acknowledged before me this 3d day of January, 1896.

J. S. MANLEY,

*Commissioner U. S. Circuit Court, Northern District of California.*

Approved.

H. S. FOOTE, *U. S. Attorney.*

(Endorsed:) Filed January 3rd, 1896. Southard Hoffman, clerk. By J. S. Manley, deputy clerk.

47 In the district court of the United States, in and for the northern district of California. In the matter of the application of Wong Kim Ark for a writ of habeas corpus. No. 11198.

You will please take notice that the United States of America, appellant in the above-entitled matter, appeals to the Supreme Court of the United States from the order and judgment of discharge made and entered herein by said United States district court on the 3rd day of January, 1896, and from the whole and each and every part thereof.

Dated at San Francisco, Cal., January 4th, 1896.

Yours, etc.,

H. S. FOOTE,

*United States Attorney and Attorney for Appellant.*

*To Messrs. Naphhtaly, Freidenrich & Ackerman and Thomas D. Riordan, Attorneys for Wong Kim Ark, and the Clerk of said District Court.*

Service of the within notice by copy admitted this 4th day of January, 1896.

NAPHTHALY, FREIDENRICH & ACKERMAN and  
THOS. D. RIORDAN,

*Attorneys for Wong Kim Ark.*

(Endorsed:) Filed Jan. 6th, 1896. Southard Hoffman, clerk.



48 In the district court of the United States in and for the northern district of California. In the matter of the application of Wong Kim Ark for a writ of habeas corpus. No. 11198.

*Assignment of errors.*

And now comes the United States of America, appellant, by its attorney, Henry S. Foote, esq., United States attorney for the northern district of California, and says that in the record and proceedings in the above-entitled matter there is manifest error, and particularly specifies the following as the errors upon which it will rely, and which it will urge upon the prosecution of its appeal in the above-entitled matter:

First. That the district court of the United States in and for the northern district of California erred in declaring that the said Wong Kim Ark is a citizen of the United States.

Second. That the said court erred in and by its judgment in declaring that the said Wong Kim Ark had not forfeited his right to return to this country.

Third. That the said court erred in and by its judgment in declaring that the detention of the said Wong Kim Ark was illegal.

Fourth. That the said court erred in and by its judgment in ordering the discharge of the said Wong Kim Ark.

Fifth. That the said judgment of discharge is contrary to law.

49 Wherefore, the said United States of America, appellant, prays that the judgment of the United States district court in and for the northern district of California be reversed.

H. S. FOOTE,

*United States Attorney and Attorney for Appellant.*

Service of the within assignment of errors by copy admitted this 4th day of January, 1896.

NAPTALY, FREIDENRICH & ACKERMAN and  
THOS. D. RIORDAN,

*Attorneys for Wong Kim Ark.*

(Endorsed:) Filed Jany. 6th, 1896. Southard Hoffman, clerk.

50 UNITED STATES OF AMERICA,  
*Northern District of California, ss:*

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing and hereunto annexed forty-nine pages, numbered from one (1) to (49) inclusive, constitute the transcript on appeal from said district court to the Supreme Court of the United States of America, in the matter of the application of Wong Kim Ark for a writ of habeas corpus, No. 11198.

In witness whereof I have hereunto set my hand and affixed the seal of said court at San Francisco, in said district, this 4th day of February, A. D. 1896.

[SEAL.]

SOUTHARD HOFFMAN,

*Clerk U. S. District Court, Northern District of California.*

(Indorsement on cover:) Case No. 16194. Term No., 904. The United States, appellant, vs. Wong Kim Ark. N. California D. C. U. S. Filed February 18th, 1896.



THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. BROWN, JR. vs. THE ATTORNEY



# In the Supreme Court of the United States.

OCTOBER TERM, 1895.

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THE UNITED STATES, APPELLANT,	} No. 904.
<i>v.</i>	
WONG KIM ARK, RESPONDENT,	

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## BRIEF ON BEHALF OF THE APPELLANT.

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### THE CASE.

This is an appeal from the district court of the United States for the northern district of California, and is taken from the judgment of that court, discharging the respondent on *habeas corpus cum causa* from the custody of the collector of port of San Francisco, who refused to permit the respondent to land in the United States for the reason that he is a Chinese laborer and within the inhibitory provisions of the Chinese exclusion act. The respondent claimed exemption from that act upon the ground that he was born within the United States, and thereby became *ipso facto* a citizen thereof. The Government, while conceding the fact of birth, denied the con-

clusion of citizenship in that respect, contending that as the respondent was born of *alien parents*, to wit, subjects of the Emperor of China, he was at his birth a subject of China, claimed by that nation to be such, and therefore was not when born "subject to the jurisdiction" of the United States within the meaning and intent of the Constitution.

The district court, following as being *stare decisis* the ruling of Mr. Justice Field in the case of *Look Tin Sing* (10 Sawyer, 358), sustained the claim of the respondent, held him to be a citizen by birth, and permitted him to land. The question presented by this appeal may be thus stated: *Is a person born within the United States of alien parents domiciled therein a citizen thereof by the fact of his birth?* The appellant maintains the negative, and in that behalf assigns as error the ruling of the district court that the respondent is a natural-born citizen, and on that ground holding him exempt from the provisions of the Chinese exclusion act and permitting him to land.

#### THE LAW.

We are aware that it is generally supposed to be the law that a person born within the United States is *ipso facto* a citizen thereof, irrespective of the nationality of his parents; but that doctrine never did have any justification, and is not sustained by any principle of international or constitutional law. It apparently originated in a misunderstanding of the nature and province of the English common-law rule that birth within the allegiance of the King made the person a subject, even though he

were born of alien parents, and was applied by our people more as a traditionary dogma than as a rule of law. For that reason the doctrine has escaped investigation or examination of the higher judicial tribunals of the land, and thus has a very dangerous error been perpetuated by acquiescence and repetition.

In this connection the remarks of Lord Chief Justice Denman in the case of *Queen v. O'Connell* (11 Clark & Fin., 372) are very pertinent. He there delivered the prevailing opinion of the court, overruling the judges of the law courts on what by common consent was deemed to be the law. He said:

I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law falls within the description of "law taken for granted." If a statistical table of legal propositions should be drawn out, and the first column headed "Law by statute," and the second "Law by decision," a third column under the heading of "Law taken for granted" would comprise as much as both the others combined. But when in the pursuit of truth we are obliged to investigate the grounds of the law it is plain, and has often been proved by recent experience, that the mere statement of a doctrine—the mere repetition of the *cantilena* of lawyers—can not make it law unless it can be traced to some competent authority and if it be irreconcilable to some clear legal principle.

We proceed to the argument of the great question presented by this appeal: Citizenship under a republican form of government appertains to political sovereignty, and therein essentially differs from the status of "subject" in a monarchical form of government. In the

latter, the subject owes allegiance to the king and not the nation—*ligeantia est vinculum fidei*, a personal relation of feudal origin, traceable to the theoretical divine right to rule, asserted by kings as the source and justification of their sovereignty. The king therefore became *pater patriæ*, the government was paternal, and in return the "subject" owed allegiance of a personal and domestic nature. It was *that* allegiance which constituted the basis of the quasi-political relation of king and subject (*Eyre v. Countess of Shaftsbury*, 2 P. Wms., 124), and not the doctrine of nationality. This is what is meant by writers on international law when they say that the status of subject in Great Britain "rests upon the somewhat peculiar conception of allegiance." (Walker on the Science of Int. Law, 205.)

In other words, instead of the allegiance arising from the *status* the latter is made to arise from it, and thus we find in the common law the meaningless doctrine that an alien while within the kingdom is a subject of the King (Kelynage, 38), on the theory that the latter affords him protection, and that on the same theory the child of such an alien becomes a natural-born subject. We say such a doctrine is meaningless, because it entirely ignores and is wholly at variance with the principle of nationality.

True, it is consistent with the "peculiar conception of allegiance" above referred to, and as defined by Blackstone, chapter 10, book 1, where he says: "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject," but such a doctrine as that, applying as it



does with equal reason and with equal force to aliens within the realm as well as to their children born there, is entirely foreign to the fundamental idea of a political status expressive of nationality; and when we consider the fact that the monarchical dogma of allegiance is at the basis of the doctrine, its total unfitness to govern the question of citizenship in a republic becomes convincingly manifest. "According to the English common law, nationality depended in all cases upon the place of a man's birth, following the feudal principle, which to a certain extent regarded all inhabitants of the soil as appendages to it." (Foote on Int. Jur., 1; Walker on Public Int. Law, 41; Hall on Int. Law, sec. 48; Walker on Int. Law, 205; Lawrence's Wheaton on Int. Law, p. 893.)

These authorities affirm the feudal origin of the common-law doctrine that birth within the *allegiance* of the King makes the person a natural-born subject, and thus prove its principle to be incompatible with the constitution of a republican form of government. Allegiance within the meaning of the common law was a duty imposed upon all persons, aliens as well as subjects. In the one case it was termed *local* and in the other *natural*. It operated to make everyone within the realm a subject of the King, but ceased to operate as to aliens when they departed the realm.

The alien father owing local allegiance, his child born on British soil was deemed to be born within *that allegiance*, and therefore a natural-born subject of the King. The same rule applied where the father had never been within the Kingdom; in that case the local allegiance of the mother was deemed sufficient. Thus the feudal idea of

allegiance dominated the common law and the monarchical principle of fealty to the King was of controlling force. These views are fully supported by the celebrated case of *Calvin*, reported in volume 7 of Lord Coke's Reports, of which case it is said in a note to 1 Hallam's Constitutional History of England, page 418:

It may be observed that the high-flying creed of prerogative mingled itself intimately with this question of naturalization which was much argued on the monarchical principle of personal allegiance to the sovereign as opposed to the half-republican theory that lurked in the contrary proposition.

It must be very apparent that the common law doctrine is essentially and peculiarly feudal and monarchical, and therefore foreign to republican institutions, where the sovereignty of the State resides in the people and each citizen is a component part of that sovereignty. It must be equally apparent that the common law doctrine could never be the basis of a general principle of international law, for it totally disregards the status of nationality, and accordingly a reference to the *jus gentium* will prove its principle to be fundamentally opposed to the doctrine of the common law, which after all is but a municipal system of jurisprudence.

Speaking of these opposing rules, Westlake, in his work on international law, at page 323, says:

Unfortunately those rules are far from being the same in all countries. They result almost everywhere from a conflict between the feudal principle of allegiance determined by birth on the soil and the Roman principle of citizenship determined by descent.

Clearly the Roman principle must be the correct one, and it is now the prevailing law ; its logic is unassailable, its policy the soundest and most salutary. Unlike the common law, it deals with the status of nationality, and not with the fealty or allegiance to a king. Unlike the common law, it is of universal application to all forms of government, and has none of the *indicia* of monarchy. Unlike the common law, it is in conformity with the eternal fitness of things and best accords with the teachings of political science and an exalted statesmanship; and unlike the common law, it best promotes the interests, the welfare of the American Commonwealth. It is declared to be the true principle by all the authorities on international law. Dr. Bar says :

To what nation a person belongs is by the law of nations closely dependent on descent. It is almost an universal rule that the citizenship of the parents determines it—that of the father where the children are lawful, and where they are not, that of the mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent. Foundlings must of course constitute an exception to this rule ; they belong to the State in which they are found. (Bar on International Law, sec. 31 ; Vattel on the Law of Nations, sec. 212 ; Savigny on International Law, sec. 351 ; Field's International Code, sec. 183.)

In the evolution of government it was discovered that the common-law rule and its characteristic theory of perpetual allegiance—the logical consequence of feudalism—was unfitted and unsuited to modern civilization, and

especially did we of the United States solemnly repudiate it as being "inconsistent with the fundamental principles of the Republic." (Rev. Stat., sec. 1999.) In thus rejecting the natural and distinguishing attribute of the common-law doctrine, to wit, that of personal allegiance, we necessarily rejected the entire doctrine itself, as it was inherently inseparable from its attribute. We found the doctrine to be essentially monarchical, and for that reason we declared it to be "inconsistent with the fundamental principles of the Republic." So, too, the English Government perceived the feudalism of the common-law rule to be inconsistent with the progress of the nation, and sought to have the law conform to principle. On the 21st day of May, 1868, a commission was appointed by the Queen to examine into the matter and report.

On February 20, 1869, the report of the commissioners was filed, wherein they recommended that the common law in respect to what constitutes a subject by birth be modified to the extent of permitting the child born within the kingdom to elect on arriving at his majority the citizenship of his parent. (See vol. 2, Foreign Relations of the United States, 1873-74, p. 1232.) From the majority report Sir W. Vernon Harcourt dissented, in an able opinion, and strongly advocated the adoption of the principle of international law (pp. 1243 *et seq.*). But it was too radical a departure from the common law, and because of that fact the majority of the commission was opposed to it, while they acquiesced in the irresistible logic of the dissenting opinion. They very likely

thought that a gradual change of the old rule would be more satisfactory, especially in view of the conservatism of the average Englishman and his reverence for the ancient dogmas of the common law.

On the 12th day of May, 1870, Parliament adopted the act entitled "An act to amend the law relating to the legal condition of aliens and British subjects" (see 33 Vict., chap. 14), and among other things recognized the right of expatriation and provided:

Any person who, by reason of his having been born within the dominion of Her Majesty, is a natural-born subject, but who also at the time of birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject.

This, of course, is very anomalous; it is impossible that a person be a subject of more than one State at a time. As said by Blackstone (book 1, chap. 10), "no man can owe two allegiances or serve two masters at once." Indeed, the allegiance to one country would neutralize that due the other, and thus there would be no allegiance to either; therein lies the nonsense of the theory of double allegiance—a theory that has long since been judicially rejected as being absurd and impossible. But it was a step in advance for the English people to even adopt the right of election and to thereby confer on the person born of alien parents the right to "make a declaration of alienage;" still it was a very lame effort to escape from

the antiquated notion of the common law, and doubtless will at an early date require an amendment that will be more in harmony with principle.

There are other nations that were by reason of peculiar circumstances compelled to adopt the anomalous doctrine of election, giving to the child on attaining majority the right to elect his nationality, between the country of his birth and the country of his father, and we apprehend this doctrine and its approval by some of our Attorneys-General and Secretaries of State arise from the very likely error of failing to distinguish between nationality and domicile. In *Udny v. Udny* (1 L. R., Scotch Appeals H. L., 457) the distinction is clearly stated by Lord Westbury.

He says:

The law of England and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions—one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil *status* or condition of the individual and may be quite different from his political *status*. The political status may depend on different laws in different countries (he doubtless has reference to naturalization), whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*, for it is on

this basis that the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy—must depend.

International law depends on rules which, being in a great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act.

\* \* \* In adverting to Mr. Justice Story's work (Conflict of Laws) I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed: "The result of the more recent English cases seems to be that for a change of national domicile there must be a definite and effectual change of nationality."

In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of *Morhouse v. Lord*, 10 H. L. Cas., 272, when, in speaking of the acquisition of a French domicile, Lord *Kingsdown* says: "A man must intend to become a Frenchman instead of an Englishman." These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality—that is, of natural allegiance. That would be to confound *patria* and *domicilium*.



And in the same case the lord chancellor pertinently said:

In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent "*exuere patriam*," or to become "a Frenchman instead of an Englishman," go beyond the question of domicile. The question of naturalization and allegiance is distinct from that of domicile.

True, for purposes of trade and within the jurisdiction of prize courts, domicile gives a national character (3 Phillimore on International Law, secs. 85, 725); but it is entirely distinct from the political *status*, and is merely that of domicile. (*The Indian Chief*, 5 Rob. Adm., 99.) Domicile of origin does not mean the place of birth, but refers to the domicile of the parent. (See 4 Phillimore on International Law, sec. 211 *et seq.*)

There is no doubt that in referring to the doctrine of election of citizenship between the place of birth and the country of the parent (the law creating the political *status*) the principle of international law governing the question of domicile, or, as the English judges term it, the question of citizenship was mistaken for the principle relating to nationality. And that accounts for the adoption of the doctrine of election by some of our Secretaries of State and Attorneys-General, and it seems to us that if they had adverted to the fact that by the Constitution the political *status* of citizenship is fixed at the *birth* of the child they would not have invoked the doctrine of election, for obviously there is no room for it. The

child when a citizen of the United States at birth continues to be a citizen until by *naturalization* in a foreign country he has expatriated himself.

We have now, in a general discussion, it is true, referred to the origin, the nature and province, and the modern modification in England of the common-law doctrine that birth within the *allegiance* of the King made the person a natural-born subject. We have pointed out the essentially monarchical and municipal nature of the doctrine, and in that connection we are reminded of the remarks of Mr. Justice Story in *Shanks v. Dupont* (3 Peters, 248), where he said:

Political rights do not stand upon the mere doctrines of municipal law applicable to ordinary transactions, but stand upon the general principles of the law of nations.

We have referred to the principle of international law and found it to be fundamentally opposed to the feudal doctrine which constitutes the rule of the common law. We have pointed out the mistakes made and the misunderstanding arising from failing to distinguish between nationality and domicile; between *patria* and *domicilium*. We pointed out the inherent distinction existing between a citizen of a republic and the subject of a monarchy as bearing upon the proposition that in principle the law defining the one was necessarily in direct antagonism to the law defining the other.

It is evident then, that our position is, that the common law doctrine never applied to either the United States or the several States, for the manifest reason that it is an essential attribute of a monarchical form of gov-

ernment and therefore "inconsistent with the fundamental principles of the Republic." The judicial *ipse dixit* to be found in this country to the contrary, emanated from nisi prius courts of limited jurisdiction, and their rulings do not justify further notice. We now proceed to the argument of the question of citizenship, as affected by the Constitution, and as divorced from the untenable but prevalent theory, that the doctrine of the common law constitutes the law of the United States, to wit, that the place of birth and not the nationality of the parent determines the political *status* of the child.

National sovereignty is by the Constitution vested exclusively in the United States; therefore citizenship or the *status* of nationality appertains not to the several States, but to the sovereignty of the General Government.

The United States is not only a government, but it is a National Government, and the only government in this country that has the character of nationality. (Per Mr. Justice Bradley in *Knox v. Lee*, 12 Wall., 457, 555; Chinese Exclusion Cases, 130 U. S., 604; *Nishimura Ekin v. United States*, 142 U. S., 651, 659; *In re Quarles*, 158 U. S., 535; *Cohens v. Virginia*, 6 Wheat., 264, 413.)

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations and with all the powers of government necessary to maintain that control and to make it effective. The only Government of this country which other nations recognize or treat with is the Government of the Union, and the only American flag known throughout the world is the flag of the United States. (*Fong Yue Ting v. United States*, 149 U. S., 711.)

Both the States and the United States existed before the Constitution. The people through that instrument established a more perfect union by substituting a national government, acting with ample power directly upon the citizens, instead of the confederate government, which acted with powers greatly restricted only upon the States. (*Lane Co. v. Oregon*, 7 Wall., 71, 76.)

Citizenship, then, in its political and international signification, relates exclusively to the sovereignty of the United States, and is of the essence of that sovereignty. On reference, therefore, to the Constitution, we determine for whom the sovereignty was created and established. The Constitution in its preamble proclaims:

*We the people of the United States*, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves *and our posterity*, do ordain and establish this Constitution for the United States of America.

It was ruled, and ruled correctly, in the case of *Dred Scott v. Sandford* (19 How., 404) that—

The words "people of the United States" and "citizens" are synonymous terms and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty.

Again, at page 406, the court say :

It is true every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body, but none other. It was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded.

The Constitution gives to the nation exclusive power to naturalize aliens; so that, reading its provisions in respect to naturalization in connection with that portion of the preamble which declares that the Constitution is ordained and established for the then people of the United States and *their posterity*, the conclusion is irresistible that no person could be a citizen unless he was of that posterity or naturalized, or the offspring of a citizen. In other words, the nation was created *primarily* for those who constituted the people of the several States at the time of the adoption of the Constitution and their descendants; and provision was made for the admission of others to membership in the body politic by means of naturalization. That, of course, excluded the children of aliens, though born within the United States, and thus, in harmony with the principle of international law, the Constitution virtually defined the *status* of citizenship.

Such was the law at the time of the adoption of the fourteenth amendment, and the first section of that amendment defines citizenship in strict accord with what was then the law; so in that respect it is merely declaratory and not legislative in its nature. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Only as citizens of the United States do they occupy the *status* of nationality; as citizens of the State their *status* is that of domicile. (2 Story on the Constitution, sec. 1693.) In the one case we have the political *status*, in the other we have the civil *status*; thus does the relation of the citizen to the State and the United States harmoniously respond to the dual nature of our governmental polity; and thus do we preserve the distinction between State and national sovereignty, and in a measure illustrate the difference between *patria* and *domicilium*.

The language of the Constitution is not that "all persons born in the United States are citizens," nor that "all persons born in the United States and subject to the jurisdiction of the laws thereof," nor that "all persons born within the allegiance of the United States" are citizens. Each one of these formulæ has at various times been used to express the definition of citizenship by birth, and each has been considered the equivalent of the definition of the Constitution, but they are all radical deviations from it in an essential respect. Indeed, none of them even express the common-law doctrine. As to the first, it was not true at common law that birth

on British soil made one a subject. In *Calvin's Case* it is said: "And it is to be observed that it is *nec coelum, nec solum*, neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born."

As to the second, the common law never considered or referred to the "jurisdiction of the laws" in defining what constituted a natural-born subject.

Allegiance being a quality of the mind, not circumscribed by space, due to the person of the King, inasmuch as his natural person can not be divided, the allegiance owing to him is inseparable and indivisible; it is not to be rendered severally in respect of one or other of his dominions. In a trial for high treason charged to have been committed just prior to the union of Scotland with this Kingdom, the doctrine thus deduced from *Calvin's Case* was on behalf of the accused strongly and ingeniously controverted. Can it be pretended, it was there asked, that the obedience due from the subject to the sovereign is an absolute blind obedience? Is it not rather such an obedience as the law of the particular Kingdom has prescribed?

If, then, this obedience is governed by the law of the place where it is due, it follows that where the laws differ the rule of obedience and subjection must differ, and consequently the allegiance due the King as King of England and the allegiance due to him as King of Scotland must, in respect of the difference of the laws of these nations, be separate and distinguishable. "Were it not so, the same act, if so in one, must in both kingdoms be the performance of the subject's allegiance; and the same act, if so in either, must in both kingdoms be the breach of it." Hence, it was argued in *Lindsay's Case* that there must be two allegiances—one owing to the King

as King of Scotland, the other owing to him as King of England; that a subject of the King in one regal capacity is not his subject in the other; that a subject of the King as King of Scotland is not a subject of the King as King of England. Reasoning such as this, if just and logical, might have led to consequences productive of perplexity or even of danger to the commonwealth.

A fallacy, however, is discoverable in it—allegiance is due from any one within the protection of the Crown, wherever, in what part soever of the dominions of the Crown he may chance to be, and that allegiance includes the obligation of obeying the laws which in such locality prevail. And hence it seems rightly argued in *Rex v. Johnson* that “There is great difference between the allegiance due to the King and the obedience due to the laws of any part of his dominions, of which the other parts of his dominions are independent.” “Allegiance to the King of the United British Empire is as much due from a Scotchman as from an Englishman, but no obedience is due from a Scotchman resident in his native land to the laws of England.” (Broom’s Constitutional Law, 31.)

This doctrine results from the nature of allegiance to the King, it being to his person; and it is therefore clear that the “jurisdiction of the law” is not an element in the determination of what constitutes allegiance. Of course, when once allegiance exists then there arises *therefrom* the duty of the King to enforce the law for the protection of the subject, and the duty of the latter to obey the law. In respect to the United States, the jurisdiction of its law is in a great measure not anywhere near being coextensive with its sovereignty, and that arises from the



fact of the Government being one of enumerated powers. If, therefore, we were to make the jurisdiction of the law the criterion of citizenship by birth we would be inverting the natural order by substituting law, the creature of sovereignty, for sovereignty itself, and thus with us, in our form of government, we would be destroying the very essence of citizenship.

Then, again, if the "jurisdiction of the law" was adopted as the test, it would apply to aliens as well as it would to citizens; and if sufficient in the latter case, or rather if sufficient to make a person born on the soil a citizen, it ought with equal reason make a resident alien a citizen, unless we ascribe to the accident of birth on the soil some magic quality in the nature of a political metamorphosis. It certainly must be apparent that "jurisdiction of the laws" has no relevancy whatever in the determination of a question of citizenship. The Constitution says nothing of the laws' jurisdiction. It speaks of the jurisdiction of the United States—meaning, of course, the political jurisdiction, the jurisdiction of national sovereignty; not the incidental power to make and enforce laws, or the operation of those laws when made, but the jurisdiction over each member of the body politic by reason of his membership. All over the world, no matter where the citizen may be, that jurisdiction extends; whereas the jurisdiction of the laws is confined to the territory of the United States and operates only on those who are within its boundaries.

As to the third formula into which the definition of the Constitution has been transposed, to wit: "All per-

sons born within the allegiance of the United States are citizens," there was no such provision in the common law. There was no allegiance to Great Britain; it was due to the King in person as lord paramount. It was "a quality of the mind," and involved the offense of treason if the subject even imagined the death of the King, although there was no overt act whatever. In Hale's Pleas of the Crown, pages 115, 116, we are told that one Thomas Burdett, having a white buck in his park, which in his absence was killed by the King hunting there, "wished it, horns and all, in his belly that counseled the King to it; whereas in truth none counseled him to it, but he did it himself. For these words he was attainted of high treason and executed."

This is an apt illustration of allegiance as understood at common law.

Allegiance is the mutual bond or obligation betwixt the master and the servant. *Item*, the mutual bond and obligation betwixt the King and his subjects, whereby we are called his lieges, because we are bound and obliged to obey and serve him. And he is called our liege King, because he should maintain and defend us. (Calvin's Case.)

As the ligatures or strings do knit together the joints of the body, so does allegiance join together the sovereign and all his subjects, *quasi uno ligamine*. (Calvin's Case.)

The legal significance of the expression "natural allegiance" appears from acts of Parliament, wherein the King is termed natural liege lord and his people natural liege subjects. (Calvin's Case.)

These quotations clearly indicate the nature of allegiance at common law, and prove it to be conclusively

and distinctly monarchical and feudal, and confined to the King and having no reference whatever to the nation. What an absurdity it would be to speak of the people of the United States as "liege subjects." And yet it would be quite proper to do so if there is such a thing as being born within the *allegiance* of the United States. The entire theory and fact of allegiance are essentially regal and utterly incompatible with a republican form of government. Allegiance was judicially described in *Countess of Shrewsbury's Case* (12 Rep., 97) as being "the best flower in the King's imperial garland." How, then, could it ever be supposed applicable to the sovereignty of a republic? There certainly is no such thing as birth within the *allegiance* of the United States, but there is such thing as birth within the *jurisdiction* of the United States.

"Subject to the jurisdiction thereof" is the language of the Constitution, and it is the most significant provision of the definition of citizenship there contained. Who are subject to the jurisdiction of the United States? Manifestly not those who are subject to the jurisdiction of any other nation, or who owe allegiance to any foreign prince, potentate, state, or sovereignty. Such is the contemporaneous exposition of the Constitution's definition by the very Congress that framed it, as is evidenced by what is now section 1992 of the Revised Statutes of the United States. It is there enacted: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Clearly, then, it was never intended

that children born in the United States of alien parents should be considered citizens.

Such children at the moment of birth would be subject to a "foreign power," to wit, the country of the parent, for it is a principle of international law, and recognized by the United States (sec. 1993, Rev. Stat. U. S.), that the children born abroad of citizens or subjects are citizens or subjects of the country of the parent. So, in respect to this case, it is the law of the Chinese Empire that the children of subjects when born abroad are subjects of the Emperor. Therefore, when Wong Kim Ark was born in San Francisco of Chinese parents there domiciled he at the moment of birth became a subject of the Emperor of China, and for that reason could not have been born "subject to the jurisdiction" of the United States. True, it appears from the record that his parents were *domiciled* in this country; but they were aliens, nevertheless, and Chinese subjects. (*Lem Moon Sing*, 158 U. S., 538, 547; *Fong Yue Ting*, 149 U. S., 724.)

The fact of domicile, therefore, did not make them citizens or operate to naturalize them; nor could it, since naturalization can only be had under an act of Congress. We are aware that Phillimore, in the first volume of his work on International Law, Chap. XVIII, page 347, in speaking of persons, or rather aliens, domiciled in a country, says: "They are *de facto* though not *de jure* citizens of the country of their domicile;" but however true that may be of a monarchy, it has no application to the United States. We have no *de facto* citizens. With us, either a person is a citizen *de jure* or he is necessarily an alien.

As the parents of Wong Kim Ark were, at the time of his birth, subjects of the Emperor of China, he was born in the *allegiance* and subject to the jurisdiction of a foreign power, and therefore could not be a citizen of the United States.

It is true, he was born in the United States; but he was not at the time of his birth, and certainly at no time afterwards, "subject to the jurisdiction thereof;" we mean, of course, the *political* jurisdiction of the nation; not the territorial jurisdiction, or which is the same thing, the jurisdiction, or more accurately, the operation of the laws. All the authorities agree that the provision of the Constitution's definition, "subject to the jurisdiction thereof," has reference to the political jurisdiction of the United States in its international relation of a sovereign nation, and not to the operation of the laws. In other words, the sovereignty of the United States is of a dual nature—internal and external. The jurisdiction of the law pertains to the former; and the political power of the nation to the latter. All persons born in the United States and subject to the *political* power thereof are citizens—natural born citizens; it follows that persons born in the United States of aliens are not citizens.

In the *Slaughter House Cases* (16 Wall., 73) Mr. Justice Miller, delivering the opinion of the court, said:

The phrase "subject to the jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The learned judge of the district court in his opinion, which appears in the record here, asserts this to be *dictum*;

but we think he is mistaken. Nothing is *dictum* that is involved in the question presented for adjudication. What were the rights, privileges, and immunities of citizens of the United States, necessarily involved the determination of who are citizens; and therefore the decision in that respect is not *dictum*.

In passing we take occasion to reassert our position that the fourteenth amendment in its definition of citizenship is declaratory of the preexisting law, although stated in the opinion of Mr. Justice Miller that it "overturns" the *Dred Scott Case*. It seems to us that the law of that case is unexceptionable. Of course, the policy of the law, to the extent that it recognized slavery, was vicious in the extreme; but the judiciary has no concern with the policy of a law; that is a political and not a judicial question. It was rather the abolition of slavery and the emancipation of the negro, as the direct and immediate result of the civil war, that removed the abject and servile condition or *status* which necessitated the decision in the *Dred Scott Case*. When the fourteenth amendment was adopted the negro had already been vested with citizenship by virtue of the abolition of slavery and his emancipation. Conferring freedom upon him removed his incapacities and disabilities, and, having been born in the United States and not subject to any other sovereignty, he became a citizen immediately upon being emancipated.

We think, therefore, that it would be more accurate to say that the *status* of slavery which occasioned and made necessary the decision in the *Dred Scott Case* was abol-

ished, and not that the fourteenth amendment in defining citizenship overturned the decision. To proceed with the argument of the main question: In *Elk v. Wilkins* (112 U. S., 102), the court held that the provision "subject to the jurisdiction" of the United States, did not mean "merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their *political* jurisdiction."

Wharton, in his work on Conflict of Laws, at section 10, says:

By the fourteenth amendment to the Constitution of the United States it is provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." If a child is born in the United States of French parents temporarily resident but not domiciled in the place of birth, is such a child a citizen of the United States by force of the amendment just stated? This depends upon the question whether the child at its birth is "subject to the jurisdiction of the United States."

In one sense it undoubtedly is. All foreigners are bound to a local allegiance to the State in which they sojourn. Yet the term "subject to the jurisdiction," as above used, must be construed in the sense in which the term is used in international law as accepted in the United States as well as in Europe. And by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right on reaching full age to elect one allegiance and repudiate the other, such election being final. The same conditions apply to children born of foreigners in the United States.

The proposition that the provision "subject to the jurisdiction" must be given the construction demanded by international law is undoubtedly correct. (See the opinion of the lord chancellor in *Udny v. Udny*, quoted in a preceding portion of this brief.) But the position taken by Mr. Wharton in respect to the existence of the right of *electing* nationality, is certainly at variance with the Constitution, as well as with international law. We have already discussed that point; but in view of the tendency heretofore manifested in some of our diplomatic correspondence to countenance the theory, we will here address attention to the fact that the Constitution fixes native citizenship *at the time of the person's birth*. (*Elk v. Wilkins*, 112 U. S., 94.) And the only possible method by which he can rid himself of the *status* thus impressed upon him is by naturalization, according to the laws of another nation. Certainly not by election; he can not even for a moment be a citizen of two nations; the repulsive absurdity of the monstrous doctrine of double allegiance is so forcibly apparent as to render wholly inexcusable any attempt in these times to invoke it.

As the political relation or *status* of citizenship is a unit and indivisible, and can only be changed by naturalization, there is no room for the doctrine of election; indeed the anomalous character of that doctrine primarily arises from attempts made to substitute for the feudal and monarchical theory of allegiance, prevailing at common law, the principle governing change of domicile, or what is called "domicile by choice," where the child on



arriving at majority may either retain his parent's domicile or elect to acquire a new one. All such attempts, while progressive steps toward the abrogation of rules such as that of the common law, are necessarily involved in a confusion of domicile and nationality, and are therefore to be rejected as being intolerably anomalous. Says Wharton :

And by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final.

It is difficult to understand how Mr. Wharton came to that conclusion, in view of the provisions of section 1993 of the Revised Statutes of the United States, and we dismiss the matter without further comment, other than to state that the principle of international law affixes the status of citizenship to such children, and does not recognize the doctrine of election. Turning to section 12 of the authority last cited, we find the law declared more in consonance with the true doctrine, but yet inaccurately. The author there says :

By the fourteenth amendment to the Constitution of the United States, which has already been cited, "all persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." Are Chinese born in the United States citizens within the above clause? If the reasoning above given, to the effect that the children born in the United States of a foreigner are not internationally subject to the jurisdiction of the United

States, be correct, then Chinese born of Chinese nonnaturalized parents, such parents not being here domiciled, are not citizens of the United States.

The obvious objection to that statement of the law is that it makes *domicile* an element of nationality. The Constitution does not countenance any such theory, neither does international law; and why the children of an alien would be citizens if born in the United States while their parent had his domicile there, and aliens if born there while he had his domicile elsewhere, is inexplicable unless on the theory of Phillimore, referred to and commented upon by us in a preceding part of this brief, that those who are domiciled in a country "are *de facto*, though not *de jure*, citizens of the country of their domicile," a theory that is undoubtedly misleading and inherently unsound. An alien domiciled in the United States is just as much an alien as though he were merely within our territory *in transitu*. (*Fong Yue Ting v. United States*, 149 U. S., 724; *Lem Moon Sing v. United States*, 158 U. S., 538, 547.)

How is it possible to say that an alien, even if domiciled in the United States, is subject to the *political* jurisdiction thereof, or even "completely subject" to the civil jurisdiction thereof? Domicile fixes upon him a civil as contradistinguished from a political status—a point we have already discussed. But the jurisdiction of the several States is more comprehensive in its operation in fixing the rights and duties, capacities and incapacities, incidental to domicile than the jurisdiction of the laws of the United States; and clearly, as domicile places the alien

in a position where he is more subject to the jurisdiction of the States than the United States, it could not by any possibility be an element in the *status* of nationality of the offspring of the domiciled alien.

We may concede that the offspring from the time of birth would be subject to the jurisdiction of his father's domicile; yet that would not furnish the jurisdiction required by the Constitution as the basis of native citizenship; for, as held in *Elk v. Wilkins* (112 U. S., 94):

The persons declared to be citizens are "all persons born or naturalized in the United States and subject to the jurisdiction thereof." The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.

As the political jurisdiction here referred to resides exclusively in the nation, it is evident that the jurisdiction of domicile, pertaining, as it does, mostly to the several States, cannot possibly be an element in determining the *status* of nationality, or national citizenship, even if we were to disregard the well-settled and natural distinction existing in international law between *patria* and *domicilium*. Now it occurs to us to suggest that perhaps Mr. Wharton made domicile an element in his definition of nationality, because of his views expressed in sections seven and eight of his work, above cited, wherein he advocates domicile as the test of civil *status*, and incidental rights, duties, and capacities, as against nationality which constitutes the test thereof, in what he terms "The new Italian school."

While his views in that respect are, in the main, undoubtedly correct, yet is it not likely that in sections ten and twelve he went to the extreme of considering domicile a test of the political as well as of the civil *status*? Others have done it—judges, writers on international law, Secretaries of State, and Attorneys-General of the United States. Is it not likely that Mr. Wharton fell into the same error? At all events, his position, virtually making domicile sufficient to confer citizenship, is clearly untenable. However, he is authority in support of the principal point of our argument, that the provision “subject to the jurisdiction” means the political jurisdiction of the United States, and not the civil jurisdiction thereof. Our illustration is this:

A citizen of the United States goes abroad and acquires a foreign domicile, in which place his child is born; now the child is in that case subject to the civil jurisdiction of the country of domicile, and so is his father; but, like his father, he is not subject to the *political* jurisdiction of the country of domicile, for he is a citizen of the United States from the moment of his birth. The same principle, of course, applies to children born in the United States of alien parents; they, too, are aliens, not being subject when born to the political jurisdiction thereof. Thus we see that both constitutional and international law concur in affixing to Wong Kim Ark the *status* of alien. But the learned judge of the district court thought it to be incumbent upon him to follow the ruling of Mr. Justice Field in the case of *Look Tin Sing*, where it was held that the provision “subject to the jurisdiction thereof”

meant the jurisdiction of the *laws* of the United States, and not its political jurisdiction. The question and ruling are thus stated by the district judge:

Does it mean subject to the laws of the United States, comprehending in the expression the allegiance that aliens owe in a foreign country to obey its laws, or does it signify to be subject to the political jurisdiction of the United States in the sense that is contended for on the part of the Government? This question was ably and thoroughly discussed *In re Look Tin Sing*, where it was held that it meant subject to the laws of the United States.

Now, it is to be noted that a jurist of considerable reputation in this country and in England, the late Prof. John Norton Pomeroy, represented the Government in that case in conjunction with the district attorney, and advocated the same views we have here presented, or entertained the same views and held to the same conclusion; and it has always appeared to us that the ruling in the *Look Tin Sing Case* was rather an effort to avoid the consequences apprehended from the enforcement of the principle we are contending for than any attempt to question its soundness. And the learned judge of the district court seems to have been influenced by similar apprehensions. He says:

The question is an important one, not alone from an abstract point of view, but because of the consequences a decision unfavorable to the petitioner would involve. For, if the contention of counsel for the Government be correct, it will inevitably result that thousands of persons of both sexes who have been heretofore considered as citizens of the United

States, and have always been treated as such, will be, to all intents and purposes, denationalized and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens and whose right as such is not and never has been questioned, because birth within the country seems to have been recognized generally as conclusive upon the question of citizenship.

In other words, that because the error has become almost universal and our people through ignorance have established a course of conduct under the authority of what Lord Chief Justice Denman terms "law taken for granted," that therefore the law has been superseded and nullified. In the first place, time or practice will not sanctify error. In the second place, it is the cardinal duty of the judicial department to administer the law regardless of its consequences, leaving to the legislature the correction of evil results.

In the third place, the injury to our country arising from the admission to citizenship of every person born on the soil, irrespective of his parentage, would be far greater and extensively more disastrous than the consequences apprehended from an enforcement of the law to those (and they are not numerous) who would merely for a limited period be deprived of the adventitious, because collateral, right of suffrage or right to hold a public office. We say "a limited period," for if desirable as and qualified to be citizens, they may become such by naturalization; and in no other way can we avoid a virtual repudiation of the well-settled policy of our country as

manifested in its naturalization laws, wisely discriminating in the selection of such aliens as are to be deemed eligible to citizenship.

For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we *must* accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage. Are Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth? If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having.

In conclusion, we feel that the prevailing ignorance relative to the law governing citizenship by birth is no excuse for the perpetuation of grievous and dangerous error; we feel that the variable, and at times empirical, views expressed by some of our public men in their diplomatic correspondence relative to the *status* of citizenship is to be greatly deprecated and can not be permitted to influence the decision of this case, the question presented being strictly judicial; we think it proper, however, to advert to the fact that when the first military draft

was proposed in August, 1862, Mr. Seward informed Mr. Stuart, then in charge of the British legation at Washington, that all foreign-born persons would be exempt who had not been naturalized, *or who were born in the United States of foreign parents.*

That was certainly a most solemn recognition at a time of great public necessity for the services of every person who could by any possibility be considered a citizen, of the principle for which we are contending, and which denies citizenship by birth to the children born in the United States of alien parents. It is said in the district court's opinion that—

The doctrine of the law of nations, that the child follows the nationality of the parents and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more logical, reasonable, and satisfactory. \* \* \*

It may be that the Executive Departments of the Government are at liberty to follow this international rule in dealing with questions of citizenship which arise between this and other countries, but that fact does not establish the law for the courts in dealing with persons within our own territory. In this case the question to be determined is as to the political status and rights of Wong Kim Ark under the law in this country.

There lurks within that view a political heresy that can not be permitted to pass unnoticed. The Constitution is the supreme law of the land; it governs all the departments of government upon *all* questions, whether they be civil or political, national or international. In defining citizenship, its provisions are conclusive upon



Congress, upon the Executive, upon the judiciary, upon the States, upon the people of the United States, in the determination of all the questions arising relative to the political status, and on all issues pertaining to the same, whether they be of national or international origin. And finally the meaning of any specific portion of the Constitution is a *judicial question* and one to be authoritatively decided by the Supreme Court of the United States, whose decision is law, and binding upon each of the other departments of the Government and upon all who are subject to the supremacy of the Constitution. (1 Story on the Constitution, sec. 387.)

Therefore a citizen of the United States, when ascertained to be such in accordance with the definition of the Constitution, is a citizen for all purposes—national and international—and must be so recognized by all the departments of the Government whenever and wherever the question may arise in respect to his political *status*.

To revert to the *argumentum ab inconvenienti*, that has been urged against the application of what may correctly be termed the principle of nationality, the district court in its opinion states that—

Counsel for the United States have argued with considerable force against the common law rule and its recognition as being illogical and likely to lead to perplexing and perhaps serious international conflicts if followed in all cases; but these observations are obviously addressed to the policy of the rule and not its interpretation.

Not so. They are addressed to the application of the rule; there is no dispute as to its interpretation. The pol-

icy of a rule often restricts its application, or at least defines it. It occurs to us, however, that the same objection the court urges against our position applies to the court's position in reference to "denationalizing" those who supposed that they were citizens and by common consent were so treated and allowed to exercise the right of suffrage; we may add, and hold public office. But, aside from that, the right of suffrage is not an incident of citizenship; it is a right or privilege entirely independent of and collateral to it, as was decided in *Minor v. Happersett* (21 Wall., 168).

Therefore the determination of the abstract question of citizenship can not possibly be influenced by considering the number of those who will no longer be entitled to vote if adjudged aliens; nor can it be influenced by considering the fact that such a judgment will result in ousting some persons who now hold public office. No election will be thus invalidated, for the voters in such cases were certainly voters *de facto*, and no official act will be open to attack, for the officials in such cases are officers *de facto*. So, where is there any ground for apprehension? The individuals affected may protect themselves and acquire citizenship, as we have already suggested, by becoming naturalized. We certainly insist that in any view of this case, or of the question involved, there is no merit whatever in the argument *ab inconvenienti*. And even if it were otherwise, the interests of the Government would be paramount. *Salus populi suprema lex*.

The entire subject of naturalization is exclusively under the control of Congress, and it would be an invasion of

its constitutional power in that respect to confer by judicial decree the status of native citizenship on the children born in this country of alien parents. There certainly is no conflict between the Constitution's definition of citizenship and its grant of power to Congress to "establish an uniform rule of naturalization;" but there would be a most decided conflict if the definition of citizenship by birth was construed to include the children of aliens. It is only by avoiding that conflict that we can logically escape the exceedingly anomalous and flagrantly inconsistent position of denying citizenship to a particular class of aliens and yet conferring the highest form of citizenship on their children, who stand in the same relation to the principle of exclusion as do their parents. The fact that such a result is possible ought of itself to be sufficient to condemn the doctrine invoked in support of the claim of Wong Kim Ark.

We respectfully submit that in law as well as in fact the respondent is an alien—a subject of the Emperor of China—and therefore not exempt from the provisions of the exclusion act. We further submit that this conclusion is not answered by setting up the doctrine that while he is a subject of the Chinese Emperor he is also a citizen of the United States and at majority had the right to elect between the two countries, as is the law now prevailing in England. (33 Viet., chap. 14.) Such double allegiance, to be terminated by election, is not possible under our Constitution. As held in *Elk v. Wilkins* (112 U. S., 94), to be a natural-born citizen the person at the time of his birth must not be "merely subject in some

respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction."

To hold that Wong Kim Ark is a natural-born citizen within the ruling now quoted, is to ignore the fact that at his birth he became a subject of China by reason of the allegiance of his parents to the Chinese Emperor. That fact is not open to controversy, for the law of China demonstrates its existence. He was therefore born subject to a foreign power; and although born subject to the laws of the United States, in the sense of being entitled to and receiving protection while within the territorial limits of the nation—a *right of all aliens*—yet he was not born subject to the "political jurisdiction" thereof, and for that reason is not a citizen. The judgment and order appealed from should be reversed, and the respondent remanded to the custody of the collector.

Respectfully submitted.

GEORGE D. COLLINS,  
*Of Counsel for Appellant.*

HOLMES CONRAD,  
*Solicitor-General.*



# **In the Supreme Court of the United States.**

OCTOBER TERM, 1896.

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THE UNITED STATES, APPELLANT, }  
                                  v.        } No. 449.  
WONG KIM ARK. }

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF CALIFORNIA.**

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## **BRIEF FOR THE UNITED STATES.**

Appellee filed his petition in the district court of the United States for the northern district of California, in which he alleged—

That said Wong Kim Ark is imprisoned, detained, confined, and restrained of his liberty by John H. Wise, collector of customs at the port of San Francisco, and the captain of the steamship *Peking*.

That he was imprisoned and restrained of his liberty illegally under circumstances set out in the petition, and he prayed for a writ of habeas corpus to be directed to John H. Wise, collector of customs at the port of San Francisco, and the captain of the steamer *Peking*.

Subsequently, he filed a second petition, reciting more in detail the matters set forth in the former petition and prayed for a writ of habeas corpus, to be directed to John H. Wise, collector, etc., and to D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company.

On the 11th of November, 1895, the United States, through Henry S. Foote, esq., United States attorney for the northern district of California, asked and obtained leave to intervene in the matter of the application for a writ of habeas corpus for reasons stated in the motion. (Rec., 9.)

The parties, by their counsel, entered into "an agreed statement of facts" (Rec., 10), which is as follows:

#### I.

That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento street, in the city and county of San Francisco, State of California, United States of America, and that his father and mother were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

#### II.

That at the time of his said birth his mother and father were domiciled residents of the United States and had established and enjoyed a permanent domicile and residence therein at said city and county of San Francisco, State aforesaid.

## III.

That said father and mother of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

## IV.

That during all the time of their said residence in the United States, as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business and were never engaged in any diplomatic or official capacity under the Emperor of China.

## V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided, claiming to be a citizen of the United States.

## VI.

That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States and did return thereto on the 26th day of July, 1890, on the steamship *Gaelic*, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States.

## VII.

That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

## VIII.

That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

From this statement of facts it appears that the parents of Wong Kim Ark returned to China in 1890, taking Wong Kim Ark with them, who was then an infant 17 years old. That Wong Kim Ark returned during the same year to the United States, but it does not appear as a fact that his parents returned with him, the inference from the "statement of facts" being that *they* did not return to the United States.

That again, in the year 1894, Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto in the month of August, 1895.

It is not agreed as a fact that Wong Kim Ark was 21 years of age when he returned to the United States in August, 1895.



It is agreed that Wong Kim Ark was a *laborer*.

The question then presented for decision is—

Is a Chinese person, born in the United States of Chinese parents, who during his infancy returned to China, taking him with them, a citizen of the United States? It appearing that he returned alone during his infancy to the United States, remained there as a laborer for three years, when he departed for China with the intention of returning to the United States.

#### ARGUMENT.

The learned judge of the district court, in a very able and elaborately argued opinion, concluded that he was "constrained to follow the authority and law enunciated in this circuit," and accordingly held the detention of the petitioner to be illegal and ordered his discharge.

The industry and labors of the learned judge might perhaps render unnecessary any further discussion of the question in this brief. But the importance of a right decision by this court entitles it to all the lights, of however feeble ray, that can be cast upon its path.

The question has been presented, but has never been directly decided by this court.

Many decisions of inferior courts, Federal and State, many opinions of the Attorneys-General of the United States, and many expressions and rulings of the State Department deal directly with the question. And it must be admitted that so far as the decisions of the courts are concerned the majority of them are in accord with the decision of the district court of California in this case.

But we are justified in the opinion that these decisions will lose much of their force as authority from the consideration that they all rest upon one or both of two grounds:

*First*, in following as an authority, which they admit as controlling them, the opinion of Assistant Vice-Chancellor Sandford in *Lynch v. Clark*, 1 Sand. Ch. Rep., 583; and

*Second*, in assuming, as was done in that case, that the common-law doctrine of England applies and controls in this country.

We will endeavor to treat this question by considering—  
What the common-law doctrine was.

Why and wherein it differed from the Continental or Roman doctrine.

Whether it was ever the doctrine of the United States.

What was the law of the United States prior to the adoption of the fourteenth amendment to the Constitution.

How, if at all, that amendment has affected this doctrine of law in the United States.

#### WHAT THE COMMON-LAW DOCTRINE WAS.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the ligeance, or, as it is generally called, the allegiance, of the King; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the King in return for that protection which the King affords the subject. The thing itself,

or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord and defend him against all his enemies. (Black. Com., book first, chap. 10, p. 367.)

The children of aliens born here in England are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours, for there, by their *jus albinatus*, if a child be born of foreign parents it is an alien. (Ib., 374.)

For subsequent provisions by statute, see 1 Broom and Hadley's Commentaries, page 450 (1st London ed.).

The inflexible rule of the English law was broken by the treaty with the United States in 1783. Prior to the ratification of this treaty the colonists in America were English subjects, owing allegiance to the English King. The common law and the statute law in England were in full force in the colonies. By this treaty the English King acknowledged the several colonies forming the United States, to be free, sovereign, and independent States, and treated with them as such, and relinquished all claim to the government, proprietary and territorial rights of the same and every part thereof.

In *Calvin's Case* (4 Coke, 1) the question was, whether Robert Calvin, the plaintiff, being born in Scotland since

the Crown of England descended to His Majesty, be an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England. The judgment of the court was that Calvin was not an alien born, the court, according to the report of the case, holding that—

An alien is a subject that is born out of the ligeance of the King and under the ligeance of another, and can have no real or personal action for or concerning land. That ligeance is a true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an instance inseparable to every subject, for as soon as he is born he oweth by birthright ligeance and obedience to his sovereign.

Natural ligeance, "due by nature and birthright," is distinguished from "*ligentia acquisita*, or denization."

The doctrine of the report being that birth within the dominion of England establishes the allegiance, and this allegiance once established can never be surrendered or discarded.

#### THERE IS NO COMMON LAW OF THE UNITED STATES.

There can be no common law of the United States. The Federal Government is composed of sovereign and independent States, each of which may have its common-law statutes, local usages, and customs. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or statutes of the United States. The common law could be made a part of our Federal system only by legislative adoption. If a common-law right is asserted in a United

States court, such court must look to the State in which the case arose.

*Wheaton v. Peters* (8 Pet., 59).

*Kendall v. United States* (12 Pet., 524).

*Lorman v. Clark* (2 McLane, 568).

*Penna. v. Wheeling, &c. Bridge Co.* (13 How., 564).

*United States v. Garlinghouse* (4 Benedict, 194).

*Smith v. Alabama* (124 U. S., 465).

*United States v. Britton* (108 U. S., 199).

*Tennessee v. Davis* (100 U. S., 257).

*United States v. Eaton* (144 U. S., 677).

#### WHY AND WHEREIN IT DIFFERS FROM THE CONTINENTAL OR ROMAN DOCTRINE.

Under a custom which was formerly so general as to be called by an eminent French authority "The Rule of Europe," and of which traces still exist in the legislation of many countries, the nationality of children born of the subjects of one power within the territory of another was dictated by the place of their birth, in the eye, at least, of the state of which they were natives. The rule was the natural outcome of the intimate connection in feudalism between the individual and the soil upon which he lived; but it survived the ideas with which it was originally connected, and probably until the establishment of the code Napoleon by France no nation regarded the children of foreigners born upon its territory as aliens. In that code, however, a principle was applied in favor of strangers by which states had long been induced to guide themselves in dealing with their own subjects, owing to the inconvenience of looking upon the children of natives born abroad as foreigners. It was provided that a child should follow the nationality of its parents. (Hall's International Law, 234 (London 1895).)

To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parents determines it—that of the father where children are lawful, and where they are bastards; that of their mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent. (International Law, Private and Criminal, by Dr. L. Bar (University of Göttingen), sec. 31.)

Vattel directly antagonizes the English rule by stating that—

The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage.

And, again, he adds :

The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction. (See *The Law of Citizenship*, Webster, p. 101 et seq.; Morse on Citizenship, part 1, passim.)

Savigny, in his *Private International Law* (p. 100, 2d London ed.), says :

Children born in wedlock have unquestionably from their birth the same domicile as their father; they may, however, afterwards freely choose another domicile when their original ceases.

Lord Mackenzie, in his *Roman Law* (p. 84), says :

Citizenship was acquired, first, by birth. In a lawful marriage the child followed the condition of the father and became a citizen, if the father was so, at the time of conception.

The national character of an individual is determined either by the fact of birth or the ties of parentage—and this constitutes the *nationality of origin*—or by naturalization in another country, which creates nationality by acquisition. (Morse on Citizenship, sec. 16, citing many writers on Roman and international law.)

WHAT WAS THE LAW OF THE UNITED STATES PRIOR TO THE ADOPTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION ?

In *Amy v. Smith* (Littell, Ky., 327), the plaintiff, a negro woman, brought an action of trespass, alleging that she was illegally held and imprisoned by the defendant as his slave. There was verdict and judgment for the defendant. On writ of error the case came, in June, 1822, before the court of appeals of Kentucky. In its opinion (p. 332) the court said :

Before we can determine whether she was a citizen or not of either of those States, it is necessary to ascertain what it is that constitutes a citizen. In England birth in the country was alone sufficient to make anyone a subject. Even a villain or a slave, born within the King's allegiance, is, according to the principles of the common law, a subject, but it never can be admitted that he is a citizen. One may no doubt be a citizen by birth, as well as a subject, but subject and citizen are evidently words of different import, and it indisputably requires something more to make a man a citizen than it does a subject. It is, in fact, not the place of a man's birth, but the rights and privileges he may be entitled to enjoy which make him a citizen. The term "citizen" is derived from the Latin word *civis*, and

its primary sense signifies one who is vested with the freedom and privileges of a city. \* \* \* No one can, therefore, in the correct sense of the term, be a citizen of a State who is not entitled, upon the terms prescribed by the institutions of the State, to all the rights and privileges conferred by those institutions upon the highest class of society. \* \* \* He may not only not be in the actual enjoyment of those rights and privileges, but he may even not possess those qualifications of property, of age, or of residence which most of the States prescribe as requisites to the enjoyment of some of their highest privileges and immunities, and yet be a citizen; but to be a citizen *it is necessary* that he should be *entitled* to the enjoyment of those privileges and immunities upon the same terms upon which they are conferred upon other citizens; and unless he is so entitled he can not in the proper sense of the term be a citizen.

In *Minor v. Happersett* (21 Wall., 166), Chief Justice Waite, delivering the opinion of the court, said:

Looking at the Constitution itself, we find that it was ordained and established by "the people of the United States;" and then, going further back, we find that these were the people of the several States that had before dissolved the political bonds which connected them with Great Britain and assumed a separate and equal station among the powers of the earth, and that had by articles of confederation and perpetual union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack



made upon them on account of religion, sovereignty, trade, or any other pretense whatever.

\* \* \* \* \*

The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature with which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives or natural-born citizens as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case, it is not necessary to solve these doubts.

In *United States v. Cruikshank* (92 U. S., 549) the court, through Chief Justice Waite, said:

Citizens are the members of the political community to which they belong. They are the people who compose the community and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

The Federal Constitution contained no definition of citizenship of the United States. It contained the provision that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but this was simply a declaration that whatever rights any State might grant to its own citizens

should be enjoyed equally by the citizens of each of the other States within the jurisdiction of the State granting such rights.

The phrase "citizen of the United States" occurs in the Constitution in the two sections of Article I relating to the qualifications of Senator and Representative in Congress; and, also, in section 1 of Article II, providing that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President."

The designation "United States" was never employed in the early days of the Republic to express a *simple*, but always a compound, political body. They were never referred to in the singular, but always in the plural number. And where the expression "citizen of the United States" occurs in the Constitution, it refers to the citizens of the several States constituting the United States. There is no reason to suppose that the idea of citizenship apart from the State, and referring to the General Government—that is, national citizenship—ever existed in the mind of anyone in those days.

True, the power was granted to Congress "to establish an uniform rule of naturalization." But that was because to the Federal Government alone belonged the power of treating or dealing with foreigners as such. It rendered a foreigner eligible to citizenship, but it did not make him a citizen.

Judge Story wrote in his commentaries:

It has always been well understood among jurists in this country that the citizens of each State con-

stitute the body politic of each community called the people of the States, and that the citizens of each State in the Union are *ipso facto* citizens of the United States.

Mr. Calhoun, in his speech on the force bill in 1833, said:

If by a citizen of the United States he (Senator Clayton, of Delaware) means a citizen at large, one whose citizenship extends to the entire geographical limits of the country, without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is, that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States.

In his dissenting opinion in the Dred Scott Case, Mr. Justice Curtis said (19 How., 577):

The Constitution having recognized the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First, that the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,

Second, that it has empowered Congress to do so; or,

Third, that all free persons born within the several States are citizens of the United States; or,

Fourth, that it is left to each State to determine what free persons born within its limits shall be citizens of such State and *thereby* be citizens of the United States.

\* \* \* \* \*

The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered that though the Constitution was to form a government, and under it the United States of America were to be one sovereign nation, to which loyalty and obedience on the one side and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were the citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people to the National Government. Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. \* \* \*

(P. 582:) The Constitution has left to the States the determination what persons born within their respective limits shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

The idea of citizenship of the United States, apart from citizenship of a State, was the offspring of that unhappy period of rabid rage and malevolent zeal when corrupt ignorance and debauched patriotism held high carnival

in the halls of Congress, and a "reconstruction" of States which had contributed largely to the construction of the United States remained an object of unremitting endeavor until the treasuries and the credit of those States had become exhausted and the plunder upon which that form of patriotism was nourished no longer remained.

The Supreme Court of the United States, in the Slaughterhouse Cases, has, we trust, forever shattered the idol of national citizenship which the "reconstruction Congress" had placed upon so lofty a pedestal. The opinion of Mr. Justice Miller, while fully recognizing citizenship of the United States, has brought out in clear, strong lines some, at least, of the features of citizenship of the States as contemplated by the Constitution, recognizing it as a fact that a person can be a citizen of the United States and at the same time not be a citizen of a State. Is the converse of that proposition true? Can a person be a citizen of a State and at the same time not be a citizen of the United States?

Mr. Benjamin Abbott, in his *Law Dictionary* (vol. 1, p. 226), says:

If citizenship can be forfeited; if a loss of citizenship may be imposed by a statute as a penalty for an offense, it would seem that, under possible legislation, a person convicted under an act of Congress imposing disfranchisement might cease to be a citizen of the Union; yet, because the offense was against the United States alone, or because there was no corresponding penal law in his State, he might be deemed to continue a citizen of the State.

So it is within the power of a State to grant to an alien, residing within her borders, all the rights and privileges enjoyed by her own citizens, so far as these are under the control of that State.

Would not such an alien become a citizen of that State, yet not a citizen of the United States?

Chief Justice Taney, in the *Dred Scott* Case, said:

We must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. \* \* \* He may have all the rights and privileges of a citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. \* \* \* Each State may \* \* \* confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in any of the other States.

Mr. John Norton Pomeroy, in his Constitutional Law (sec. 390), says:

While it is settled, then, upon principle, authority, and continuous practice, that the Congress of the United States has exclusive authority to make rules for naturalization, it must not be understood that the States are deprived of all jurisdiction to legislate respecting the rights and duties of aliens. They permit or forbid persons of alien birth to hold, acquire, or transmit property, to vote at State or national elections, etc. These capacities do not belong to United States citizens as such. Congress would transgress its powers were it to assume to make rules upon these subjects.

In 2d Kent's Commentaries (14th ed.) it is said in the text, "Natives are all persons born within the jurisdiction and allegiance of the United States." And in a note by the author it is added:

This is the rule of the common law without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. (*Calvin's Case*, 7 Coke, 1; *Lynch v. Clarke*, 1 Sanford's Ch., 584-639.) In this last case the doctrine relative to the distinction between aliens and citizens in the jurisprudence of the United States was extensively and learnedly discussed, and it was adjudged that the subject of alienage under our national compact was a *national* subject, and that the law on this subject, which prevailed in all the United States, became the common law of the United States when the union of the States was consummated, and the general rule above stated is consequently the governing principle or common law of the United States and not of the individual States separately considered.

In *Lynch v. Clarke* the bill was brought by Patrick Lynch against John Clarke and Julia Lynch for certain real estate in the State of New York. The facts in brief were that John Clarke and Thomas Lynch were partners in New York from 1808 to 1833, when Thomas Lynch died. They had bought valuable real estate, paid for with partnership funds, the deeds to all of which were taken to Clarke alone. Clarke in his answer insisted, first, that the purchases were made for his exclusive use and benefit, and had been paid for with money loaned to

him by the partnership firm; secondly, that Julia Lynch was a citizen of the United States and inherited all the real estate of Thomas Lynch. The case turned upon the citizenship of Julia Lynch. Her parents were British subjects, domiciled in Ireland. They came to this country in 1815, remained till the summer of 1819, and then returned to Ireland. Julia was born in the city of New York in the spring of 1819. Her parents took her with them on their return to Ireland, and she remained there till after the death of Thomas Lynch. Julia came from Ireland to this country with her uncle Bernard in 1834. She was then about 15 years of age.

The argument of counsel and the opinion of the chancellor display a wealth of learning and a thoroughness and extent of argument which might seem to have exhausted the subject and the methods of its treatment.

Upon the statement of the case one naturally inquires why the range of inquiry and discussion extended beyond the constitution and laws of the State of New York, by which the law of the inheritance of real estate in that jurisdiction would seem to have been governed.

But such inquiry is met in the very outset of the chancellor's opinion, as follows:

It is undoubtedly true that the right to real estate by descent in this State must be governed by the municipal law of the State. And by the law of this State, which in this respect is the common law, aliens can not inherit land. But this does not relieve the case from its difficulty, because we have no State law which in express terms declares who are aliens or who are citizens, either in general or



for the purpose of inheriting land. It thus becomes necessary to inquire who is an alien according to the laws which must control that subject in this State. No one can dispute the power of this or any other State in the Union to regulate the subject of inheritance. The State legislatures may enable aliens to hold and inherit lands unconditionally in their respective States. But where they have omitted to legislate and the common law disability is left to operate against aliens, the right to inherit, when disputed on this ground, must be determined on some general principle or rule of law which ascertains who are aliens and who are citizens.

The learned chancellor then argues that the right of citizenship is "not a matter of mere State concern. It is necessarily a *national right* and character. It appertains to us, not in respect to the State of New York, but in respect of the United States."

He then argues and decides that the power to legislate as to aliens—to confer upon them the rights of citizenship—was given to Congress; and—

That such power was intended to be and necessarily must be exclusive. \* \* \* And whether or not the Constitution enabled Congress to declare that the children born here of alien parents, who never manifested an intention to become citizens, are aliens or are citizens—it is clear that the decision of that question must be by some general rule of law applicable to and affecting our whole nation. It must be determined by what may be called the *national law* as contradistinguished from the local law of the several States. It is purely a matter of national jurisprudence and not of State municipal law.

He then passes to the consideration of the question, "What is the national law of the United States on this subject?" and concludes that "the common law prevails in the United States as a system of national jurisprudence," and (p. 663)—

Upon principle, therefore, I can entertain no doubt but that, by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural-born citizen. \* \* \*

No one asks whether his parents were citizens or were foreigners. It is enough that *he was born here*, whatever were the *status* of his parents.

Before undertaking an inquiry as to the correctness of the decision in this case it may be well to recognize the extent of the influence which it has exercised in the executive and judicial departments of the Government.

On July 18, 1859, Mr. J. S. Black, in reply to a question from Mr. Cass, Secretary of State, said:

That a free white person born in this country of foreign parents is a citizen of the United States. (*Lynch v. Clarke et al.*, 1 Sandf. Ch. R., 583; 9 Op. Atty. Genl., 373.)

No other reason or authority is given for this opinion.

In September, 1862, to a question submitted to Mr. Bates by Mr. Seward, Secretary of State, as to "whether a child born in the United States whose parents are aliens who have never been naturalized can without naturalization be considered a citizen of the United State," the Attorney-General was—

Quite clear in the opinion that children born in the United States of alien parents who have never

been naturalized are native-born citizens of the United States and of course do not require the formality of naturalization to entitle them to the rights and privileges of such citizenship.

He said he might sustain this opinion by a reference to the common law, to the commentators on our Constitution, and to the decisions of many of our national and State courts; but he forbears, because "all this has been well done by Assistant Vice-Chancellor Sandford in the case of *Lyuch v. Clarke*" (10 Op. Atty. Gen'l., 328, 329).

In September, 1884, in the United States circuit court for the district of California, *Look Tin Sing* filed his petition for habeas corpus, setting forth that he was born in California in 1870; that he went to China in 1879, and returned to the port of San Francisco in September, 1884; that he is the son of Chinese parents who are and always have been subjects of the Emperor of China; that his father is a merchant in California and had sent petitioner to China, but with the intention that he should return to this country; that petitioner is without the certificate required by the acts of 1882 and 1884, and for that reason the United States officers prohibit his landing in the United States and illegally detained him on board vessel. The case was heard before Mr. Justice Field and Judges Sawyer and Sabin. The opinion was delivered by Mr. Justice Field. (10 Saw., 354.)

The learned justice, after stating that—

The English doctrine of perpetual and unchangeable allegiance to the government of one's birth attending the subject wherever he goes has never taken root in this country, although there are judi-

cial dicta that a citizen can not renounce his allegiance to the United States without permission of the Government, etc.

and that this was the opinion of Chancellor Kent when he published his commentaries, concludes, that the words in the fourteenth amendment "subject to the jurisdiction thereof" do not exclude the petitioner from being a citizen; "he is not within any of the classes of persons excepted from citizenship, and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country. \* \* \* This subject was elaborately considered by Assistant Vice-Chancellor Sandford in *Lynch v. Clarke* (1 Sandf., 583)."

In 1888 the case of *Chin King* came before the circuit court of the district of Oregon. (35 Fed. Rep., 354.) Judge Deady, in discharging the prisoner from custody, said:

By the common law, a child born within the allegiance—the jurisdiction—of the United States is born a subject or citizen thereof, without reference to the political status or condition of its parents. (*McKay v. Campbell*, 2 Saw., 118; *Look Tin Sing*, 10 Saw., 353; 21 Fed. Rep., 905; *Lynch v. Clarke*, 1 Sandf. Ch., 583.)

After commenting approvingly upon the opinion of Chancellor Sandford and the opinion of Justice Field in 10 Sawyer, the learned judge concludes:

However, in my judgment, a father can not deprive his minor child of the status of American citizenship impressed upon it by the circumstances of its birth under the Constitution and within the jurisdiction of the United States.

The same question came again before the same judge on October 10, 1888, in *Yung Sing Hee* (36 Fed Rep., 437), when, referring to the same cases, he said:

On this state of facts both by the common law and the fourteenth amendment the petitioner is an American citizen and is entitled to come and go within the United States as any other such citizen. She was born within or subject to the jurisdiction of the United States, and is therefore a citizen thereof.

And then, referring to the legislation prohibiting the immigration of Chinese laborers, he adds:

So harsh and unjust a measure as this concerning the intercourse between friendly nations maintaining diplomatic relations is something unprecedented in this age of the world and can only be accounted for by the fact that a Presidential election is pending, in which each political party is trying to outbid the other for the "sand lot" vote of the Pacific Coast and particularly for that of San Francisco.

At the same time the case of *Wang Gan* (36 F. R., 553) came before Judge Sawyer, who decided it in accordance with, and, as he states, in consequence of, the decision of Justice Field in 10 Sawyer.

In June, 1895, the question came before the supreme court of New Jersey in *Benny v. O'Brien*, reported at large, 32 Atlantic Rep., 696. The court, through Van Syckel, J., after citing the case of *Lynch v. Clarke*, 1 Sandf., 583, and *Look Tin Sing*, 21 F. R., 905, and referring to other cases, concludes:

Persons intended to be excepted are only those born in this country of foreign parents, *who are*

*temporarily traveling here*, and children born of persons resident here in the diplomatic service of foreign governments.

[Here is introduced for the first time a new element in the judgments upon this question, to wit, that a child born within the jurisdiction of the United States of "foreign parents who are temporarily traveling here" is not a citizen of the United States because of the *temporary residence* of the parents; whether a "temporary residence" depends upon the *animus revertendi* of the parents or upon the mere length of their stay in this country, does not appear. It is a fact of which the court may take judicial notice that *all* Chinese persons, as a rule, are but temporary residents of this country; they come and remain here, always intending to return.]

To the same effect have been the opinions and instructions from the State Department. On June 6, 1854, Mr. Marcy, Secretary of State, wrote to Mr. Mason, minister to France :

In reply to the inquiry which is made by you in the same letter, whether the "children of foreign parents *born in the United States*, but brought to the country of which the father is a subject and continuing to reside within the jurisdiction of their father's country, are entitled to protection as citizens of the United States," I have to observe that it is presumed that according to the common law any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship. There is not, however, any United States statute containing a provision upon this subject, nor, so far as I am aware, has there been any judicial decision in regard to it.

April 14, 1873, Mr. Fish to Mr. Ellis.

So far as concerns our own local law, a child born in the United States to a British subject is a citizen of the United States.

February 16, 1877, Mr. Fish writes to Mr. Cushing:

The minor child of a Spaniard, born in the United States, and while in the United States, or in any other country than Spain, is a citizen of the United States. "The United States has, however, recognized the principle that persons although entitled to be deemed citizens by its laws may also by the law of some other country be held to allegiance in that country."

November 15, 1881, Mr. Blaine to Mr. O'Neill:

The child born to an alien in the United States loses its citizenship on leaving the United States and returning to its parents' allegiance.

In November, 1885, the case of *Richard Greisser* was the subject of correspondence between Mr. Bayard and Mr. Winchester, minister to Switzerland. Greisser was born in 1867 in the State of Ohio. His father was a German subject domiciled in Germany. The son left this country with his mother when he was under 2 years old and joined his father in Germany, where he had previously returned.

He applied for a passport to this country. Mr. Bayard said:

"Richard Greisser was no doubt born in the United States, but he was on his birth "subject to a foreign power," and "not subject to the jurisdiction of the United States." He was not, therefore, under the statute and the Constitution a citizen of the United States by birth, and it is not pretended that he has any other title to citizenship.

The foregoing extracts are all taken from 2 Wharton's International Law Digest (sec. 183).

We have seen that the opinions of the Attorneys-General, the decisions of the Federal and State courts, and, up to 1885, the rulings of the State Department all concurred in the view that birth in the United States conferred citizenship, and that this view was founded on the notion that the common-law doctrine of allegiance obtained in this country and, also, on the authority of the decision of Chancellor Sandford in *Lynch v. Clarke*.

THE CASE OF *LYNCH v. CLARKE* (1 SANDFORD'S CHANCERY 584), CONSIDERED.

It is worthy of remark that the supreme court of the State of New York has somewhat impaired the force of that decision as authority in that State, by a significant query.

The case of *Munro v. Merchant* (26 Barb. Sup. Ct. Rep., 400) was decided in January, 1858; it presented the same question that arose in *Lynch v. Clarke*. Judge Allen, speaking for the court, said:

In *Lynch v. Clarke* (1 Sandf., 583), the question was precisely as here, whether a child born in the city of New York, of alien parents, during their temporary sojourn there, was a native-born citizen or an alien; and the conclusion was that, being born within the dominion and allegiance of the United States, he was a native-born citizen, whatever was the situation of the parents at the time of the birth. That case, *if it be law*, would seem to be decisive of the present question.

The chancellor holds that the right of Julia Lynch to inherit as the heir of Thomas Lynch must be determined



"by the state of allegiance existing at his death when the descent was cast"—that it "depends upon her alienage or citizenship at the time of her departure from this country in 1819." That at common law Julia, by virtue of her birth alone, became a citizen of the United States. That because the State of New York, where the land lay, had omitted to define by legislation who were aliens and to authorize aliens to hold and inherit lands unconditionally, that the common law disability is left to operate against aliens and "the right to inherit when disputed on this ground must be determined on some *general principle, or rule of law*, which ascertains who are aliens and who are citizens."

He holds "That this general principle is not to be obtained from the local or municipal law of the State of New York." That the right of citizenship "is necessarily a *national right* and character." That "as citizens we owe a particular allegiance to the sovereignty of our own State and a general allegiance to the confederated sovereignty of the United States." That "it is evident that the subject of alienage must be controlled by the general and not by the local allegiance." That "the right of citizenship in its enlarged sense was, after the adoption of the Constitution, not only a national right, but from the nature of the case it must from thenceforth be governed by the law of the whole nation and the acts of the National Legislature."

These quotations are made here thus full to show that the foundation of the chancellor's opinion was that although the land lay within the jurisdiction of the State of New York, and the single question was whether a

certain person could inherit land, that, because a question was raised as to whether that person was an alien or a citizen, that resort must be had, not to the laws of the State of New York, but to the laws of some other jurisdiction, elsewhere in this opinion called "national law," to ascertain and determine this question of inheritance, as though it were possible for any Federal law, or United States law, or "national law," written or unwritten, to determine a question of inheritance in one of the States. He insists that in Congress alone is the exclusive power of determining who are and who are not citizens. He ignores, if he does not repel, the idea that one may be a citizen of the United States and yet not a citizen of any State in the Union. That as a citizen of the United States he may be entitled to the enjoyment of certain rights and privileges but may be wholly debarred from participation in many of the most valued rights and privileges enjoyed by citizens of the States.

In the *Slaughterhouse Cases* (16 Wall., 73), Mr. Justice Miller, delivering the opinion of the court, said:

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.

Before the *Act of April 9, 1866* (14 St., p. 27), the United States had never defined citizenship.

The United States have no statute of descents and no laws of inheritance.

In *United States v. Fox* (94 U. S., 320), this court said:

It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. (*McCormick v. Sullivan*, 10 Wheat., 202.) The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created and would seriously embarrass the landed interests of the State.

Yet the learned chancellor rested his judgment in this case on the proposition that the question of inheritance of lands in the State of New York must depend exclusively on the Federal law. He concludes (p. 646):

\* \* \* it is clear that the decision of that question must be by some general rule of law applicable to and affecting our whole nation. It must be

determined by what must be called the *national law* as contradistinguished from the local law of the several States. It is purely a matter of national jurisprudence and not of State municipal law.

He next passes to the inquiry; "What is the national law of the United States on this subject?" and concludes (p. 655):

It is a necessary consequence from what I have stated that the law which had prevailed on this subject in all the States became the governing principle or common law of the United States.

He holds, contrary to the doctrine announced in the numerous cases hereinbefore cited, that the common law, without adoption in express terms by the Constitution or statutes of the United States, yet obtains and prevails here as a "national law."

Assuming that before the adoption of the fourteenth amendment there was such a thing as "a citizen of the United States," as distinguished from "citizens of the several States," and that the State of New York had adopted the common law of England as part of her jurisprudence, but had omitted to define by legislation who should be citizens of that State, is it true, as announced by Chancellor Sandford (p. 644) as the corner stone of his decision, that—

The application of any law of this State, written or unwritten, to the right of citizenship would conflict with the reason of the thing as a matter of national concern and with the powers of Congress under the Constitution. Citizenship, as I have shown, is a political right which stands not upon the

municipal law of any one State, but upon the more general principles of national law. It constitutes national character, not mere territorial designation.

This court had declared, in the *Slaughter House Cases* (16 Wall., 73), "that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual."

And it had also declared, in *United States v. Fox*, *supra*, "that the disposition of immovable property by deed, descent, or any other mode, is *exclusively* subject to the government within whose jurisdiction the property is situated."

And yet the learned chancellor held that this immovable property, this real estate situated within the jurisdiction of the government of the State of New York, passed by descent from an alien owner to Julia Lynch, not as a citizen of the State of New York, not under any law written or unwritten of that State, but under "a national law," "a common law of the United States," a common law which was all the more potent in its operation for being an unwritten law, because that learned chancellor would hardly have ventured to maintain that the Congress of the United States, by a positive statutory enactment, could have controlled the devolution of title to real property within the several States of the Union.

It was as true at that day as it was when this court pronounced the solemn words in *United States v. Fox*, "The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are

not matters placed under the control of Federal authority." Such control would be foreign to the purposes for which the Federal Government was created and would seriously embarrass the landed interests of the State.

Article XXXV of the New York constitution of 1777 declared:

That such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th of April, 1775, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall from time to time make concerning the same.

And this court decided, in *Lessee of Levy et al. v. McCartee* (6 Pet., 102), that in the State of New York—

An alien has no inheritable blood, and can neither take land himself by descent nor transmit land from himself to others by descent.

Each of the original thirteen States, I believe, and most of those subsequently admitted into the Union, deemed it necessary, either in their constitutions or by express statutory enactment, to make the common law of England part of their jurisprudence.

Neither in the Constitution of the United States nor by any act of Congress down to the adoption of the fourteenth amendment, was the common law made part of the law of the United States. Yet the learned chancellor found that the United States had a common law, and that by virtue of that common law the land of an alien

in the State of New York passed to another alien as a citizen of the United States.

How this decision has received the approval of the learned judges and jurists who have made it the basis of judicial decision and official action is, in the light of the law as at present understood and applied, altogether inexplicable.

We have imported and adopted into the language of our statutes and judicial decisions many of the terms resulting from and appropriate only to feudalism. This, perhaps, was a necessity growing out of the poverty of English vocabulary.

The terms thus borrowed were used analogically, or as expressing approximately the meaning sought to be conveyed. But now they have risen up to torment us in this, that arguments founded upon the original significance and application of these terms are being urged in support of the insistence that notwithstanding the fact "that all men are created equal, that they are endowed by their Creator with certain inalienable rights. \* \* \* That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed"—yet that these men are but liege men to some sovereign power, and acquire and hold their lands subject to the incidents of feudal tenure.

In *Talbert v. Jansen* (3 Dall., 140), counsel for appellant in argument said:

From the feudal system sprung the law of allegiance, which, pursuing the nature of its origin, rests on lands, for when lands were all held of the Crown then the oath of allegiance became appropriate. It

was the tenure of the tenant or vassal. \* \* \* Yet it is to be remembered that, whether in its real origin or in its artificial state, allegiance, as well as fealty, rests upon lands, and it is due to persons. Not so with respect to citizenship, which has arisen from the dissolution of the feudal system and is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship differ indeed in almost every characteristic. Citizenship is the effect of compact; allegiance is the offspring of power and necessity. Citizenship is a political tie; allegiance is a territorial tenure. Citizenship is the charter of equality; allegiance is a badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude. Citizenship is communicable; allegiance is repulsive. Citizenship may be relinquished; allegiance is perpetual.

In *Field et al. v. Adrian et al.* (7 Md., 214), the court of appeals of Maryland held, in 1854, that—

A party may not be a citizen for political purposes and yet be a citizen for business or commercial purposes.

A child born upon the soil of England was an English subject (not citizen), because the lord of that soil had the right of wardship and because the tenant, not being governed by his own consent, was not permitted to renounce the allegiance—to break the ligament which bound him to lord and land.

With far more propriety might we claim for bishops and archbishops of our religious communions all the power which was vested in those offices under the hierarchy of the established Church of England. For these, as well as those, were creations of the common law.



HOW, IF AT ALL, HAS THE FOURTEENTH AMENDMENT OF THE CONSTITUTION AFFECTED THIS DOCTRINE OF THE UNITED STATES?

The fourteenth amendment, if ever lawfully adopted at all, was at least adopted *de facto*, on the 21st of July, 1868. It provides :

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

What was meant by "subject to the jurisdiction thereof?" How may we ascertain what that phrase was intended to express?

Some light, at least, may be derived from the debates to which it gave rise when the subject was before Congress for consideration.

When the joint resolution proposing the fourteenth amendment reached the Senate, Mr. Doolittle offered as an amendment that after the word "thereof," in the first section, the words "excluding Indians not taxed" be inserted. The debate which followed was on that amendment. (Congressional Globe, part 4, 1st sess. 39th Cong., p. 2890.)

*Mr. Trumbull* (p. 2893). What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else; that is what it means. Can you sue a Navajo Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? \* \* \* Are they subject to our jurisdiction in any just sense? They are not subject to our jurisdiction. We do not exercise jurisdiction over them. It is only those persons

who come completely within our jurisdiction who are subject to our laws that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens.

*Mr. Reverdy Johnson.* Now, all that this amendment provides is that all persons born within the United States and not subject to some foreign power—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision. If there are to be citizens of the United States entitled everywhere to the character of citizens of the United States there should be some certain definition of what citizenship is, what has created the character of citizen as between himself and the United States, and the amendment says that citizenship may depend upon birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States. I am, however, by no means prepared to say, as I think I have intimated before, that being born within the United States, independent of any new constitutional provision on the subject, creates the relation of citizen to the United States.

*Mr. Howard* (p. 2895). I concur entirely with the honorable Senator from Illinois that the word "jurisdiction," as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the Executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

*Mr. Williams* (p. 2897). I understand the words here "subject to the jurisdiction of the United States" to mean fully and completely subject to the jurisdiction of the United States. If there was any doubt as to the meaning of those words, I think that doubt is entirely removed and explained by the words in the subsequent section; and believing that in any court or by any intelligent person these two sections would be construed not to include Indians not taxed, I do not think the amendment is necessary.

I have not undertaken to repeat the debate, or to do more than introduce here the recognized leaders and the ablest lawyers of the two political parties in Congress, to show from their own language a concurrence of opinion that the words "subject to the jurisdiction thereof" applied to those only who were subject to the complete jurisdiction of the United States in all the departments of its Government; and that it was not to be extended to the children of Chinese parents, who were the subjects of a foreign power; whose residence here was temporary and for purposes of business only; who had left China with the intention of returning and whose stay here, however protracted, was not with the intention of remaining; persons over whom the State and Federal governments exercised no other jurisdiction than they did over the tourist, or the man of business, who remain only until the objects of their visit are fulfilled.

The same Congress, by which the fourteenth amendment to the Constitution was framed and proposed to the States, had already passed the civil rights bill, in the first section of which citizenship of the United States was

defined, and that definition still stands in our statute books. (Sec. 1992 Rev. Stat.)

All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

"Not subject to any foreign power" is merely the negative of "subject to the jurisdiction of the United States."

No direct decision of this question has ever been made by the Supreme Court of the United States. But language has been employed in several opinions of that court which may be safely accepted as equivalent.

In *Elk v. Wilkins* (112 U. S., 94), the question presented was, whether an Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a State, but who has not been naturalized or taxed, or recognized as a citizen, either by the United States or by the State, is a citizen of the United States within the meaning of the first section of the fourteenth amendment?

Mr. Justice Gray, speaking for a majority of the court, said:

The main object of the opening sentence of the fourteenth amendment was to settle the question upon which there had been a difference of opinion throughout the country and in this court as to the citizenship of free negroes (*Scott v. Sandford*, 19 How., 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or

not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. (*Slaughterhouse Cases*, 16 Wall., 36-73; *Strander v. West Virginia*, 102 U. S., 303-306.)

This section contemplates two sources of citizenship, and two sources only—birth and naturalization. The persons declared to be citizens are “all persons born or naturalized in the United States and subject to the jurisdiction thereof.” The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance.

In the *Slaughterhouse Cases* (16 Wall., 73), Mr. Justice Miller, delivering the opinion of the court, speaking of the fourteenth amendment, said:

That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase “subject to its jurisdiction” was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States.

Aliens temporarily in this country are in a certain sense and to a certain extent subject to its jurisdiction. They must obey its laws, must keep the peace, must injure no one in person or property, must pay their debts—but they can not be placed upon juries, or made to work the public roads, or bear many of the burdens which rest upon him who is subject to the complete jurisdiction of the United States. So, too, they are not eligible for office or to positions of trust and confidence in either of the three great departments of the Government.

The citizenship of Chinese infants is inconsistent with the whole policy of the United States as declared by the acts of Congress.

Dr. Wharton says (2 International Law Digest, sec. 197):

Chinese also are not citizens in the contemplation of the fourteenth amendment, since they are not capable of naturalization under our system.

By the *Act of May 6, 1882*, section 14 (22 St., 61), it is provided:

That hereafter no State court, or court of the United States, shall admit Chinese to citizenship.

The same act provides (sec. 1):

That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having come after the expiration of said ninety days, to remain within the United States.

Section 4 provides as to Chinese laborers who were in the United States on the 17th of November, 1880, that they may go from and come to the United States after they have been properly listed and have received certificates provided for in the act.

Section 9 provides that no Chinese laborer shall be permitted to land without first producing his certificate.

The petitioner here, it is agreed, was a Chinese laborer at the time of his attempt to land in August, 1895. But he was born in 1873, and, consequently, on the 17th of

November, 1880, was but 7 years of age, and could not, therefore, claim the privileges extended under section 4 of that act to Chinese persons who in 1880 were laborers.

Dr. Wharton says :

The term "subject to jurisdiction" must be construed in the sense in which the term is used in international law, as accepted in the United States as well as in Europe. And by this law the children born abroad of American citizens are regarded as citizens of the United States with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final. (Conflict of Laws, sec. 10.)

Section 1977, Revised Statutes, provides :

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons or property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

SEC. 1978. All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.

The constitution of Massachusetts (Art. IV, part first) provides :

The people of this Commonwealth have the sole and *exclusive right* of governing themselves, as a free,

sovereign, and independent State; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them *expressly* delegated to the United States of America in Congress assembled.

The oath of office prescribed in chapter 6 of the constitution of Massachusetts was:

I, A. B., do truly and sincerely acknowledge, profess, testify, and declare that the Commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State; and I do swear that I will bear true faith and allegiance to the said Commonwealth. \* \* \* I do renounce and abjure all allegiance, subjection, and obedience to the King, Queen, or Government of Great Britain and every other foreign power whatsoever; and that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical, or spiritual, within this Commonwealth, *except* the authority and power which is or may be vested by their constituents in the Congress of the United States.

What is the virtue of "except?"

No foreign prince, person, prelate, state, or potentate, *except* the Congress of the United States?

Has Massachusetts in her sovereignty, here so solemnly declared, no power to regulate and control the transmission of title to real estate within her jurisdiction? Has she no power to define the jurisdiction and prescribe the rules of pleading and evidence for her own courts? Yet, how can such power consist with the powers granted in sections 1977 and 1978 of the Revised Statutes of the United States?



Chinese persons are denied admission into the United States. They are prohibited from naturalization; and yet, under these two sections, Congress has assumed to grant to them within the State of Massachusetts all the rights and privileges which the citizens of that great Commonwealth enjoy under their constitution. If the United States by its acts excluding Chinese persons has thus declared them unfit for citizenship within the United States, may not Massachusetts in like manner exclude them from her jurisdiction and deny to them the right to acquire or hold real estate within her limits?

Has she not denied in the past, if she does not now, to all aliens the right and power of holding real estate in her territory? Yet, if the decision of the court below is sound, and this Chinese native of California is, in virtue of his birth, a citizen of the United States, then, under section 1978, Revised Statutes, he may "purchase, lease, sell, hold, and convey real and personal property" in the State of Massachusetts, her constitution and laws to the contrary.

The United States existed before "the more perfect union" was formed by the present Constitution. The citizens of each of the several thirteen States constituted those States, respectively; and yet the present Constitution of the United States, in its preamble, does not say "We, the citizens of the United States," but "We, the people of the United States."

In *Penhallow et al. v. Doane's Admrs.* (3 Dall., 92), Mr. Justice Iredell said:

It never was considered that before the actual signature of the articles of confederation a citizen

of one State was to any one purpose a citizen of another. He was to all substantial purposes as a foreigner to their forensic jurisprudence. If rigorous law had been enforced, perhaps he might have been deemed an *alien* without an express provision of the State to save him.

Only by virtue of the Constitution alone is it that—

The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

How easy would it have been to have covered the whole ground by the declaration that "all the citizens of the United States shall have equal privileges and immunities in every State."

Doubtless the people of the United States have the same power to amend their Constitution of government which they exercised when that Constitution was ordained and established.

If it escaped the inspired sagacity of the framers of that immortal instrument to discern, and remained for the superior virtue and intelligence of the sublime patriots of the reconstruction era to discover, the necessity for a citizenship of the United States—a national citizenship—the power was theirs to propose and with the people to approve and adopt.

It is true, as to the fourteenth amendment, that its adoption, so far as the ten Southern States were concerned, was of something more than doubtful validity,<sup>1</sup>

<sup>1</sup> In his Constitutional History of the United States (vol. 2, p. 376 et seq.), Mr. George Ticknor Curtis says :

"What Congress could constitutionally do in 1867 was to propose the fourteenth amendment to the legislatures existing at the

the votes of those States being made by the express terms of the law a condition precedent to the enjoyment and exercise of their right to representation in the Government by which they were taxed, which derived its just powers from the consent of the governed.

time in several States; and in each of the Southern States there was a legislature just as well as there was in every other State. Any species or form of compulsion exerted by the Federal Government to coerce the people of any Southern State into the adoption of the amendment was precisely the same kind of usurpation that it would have been in any other State if such compulsion had been used in any other. Perfect freedom in the adoption or rejection of any amendment is a fundamental right of every State implied in the framework of the amending power.

"But Congress in 1867 did not see fit to pursue the constitutional course. It adopted a method of proceeding in ten States that was entirely aside from the Constitution, and that was at variance with the method of proceeding in all the other States. In the latter no coercion of any kind was used and none would have been tolerated. In the former, the reconstruction acts, which applied only to those ten States, set aside the existing State governments and provided for the formation of a new government in each of them, to be created by a convention of delegates elected by the male citizens of the State 21 years old and upward, of whatever race, color, or previous condition, who had been resident in the State for one year previous to the day of such election. One government which was certain to reject the proposed amendment was deposed to make room for another government which would certainly ratify it. This was done by a process which came to be called reconstruction. It was a process that could not be applied to all the States alike, and for this reason, even if there had been no other, it was not within the scope of the amending power. That power never contemplated action upon an amendment by any bodies excepting the 'legislatures' or 'conventions' in the several States.

"It will presently be seen that in six States the bodies which were counted officially as among the ratifying bodies were neither 'legislatures' nor 'conventions' in the sense of the Constitution.

That amendment declares that all persons born within the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

In order that Wong Kim Ark may become a citizen

They were bodies organized for the express purpose of bringing about a seeming ratification. This is a blot on our constitutional history which no writer can omit to notice. The framers of the reconstruction acts probably gave very little thought to the article of the Constitution which embraces the amending power. If they considered it at all, they made it read as if it had empowered two-thirds of both Houses whenever it should appear that a proposed amendment was not likely to be ratified by the legislature of any State to take measures to constitute a new legislature which would be certain to ratify it. Congress in 1867 was a body long accustomed to the sound of the doctrine that powers must be exercised without looking for them in the Constitution. Apparently they did not regard the process of reconstruction as warranted by the Constitution, for the object to be accomplished in the Southern States required the creation of a new sovereign people in each of them.

"Although the last clause of the fourteenth amendment authorized Congress to enforce its provisions by appropriate legislation, it could only be after the amendment had been duly ratified and had become part of the Constitution that this power of enforcing its provisions could be resorted to. The power did not embrace an authority to subvert the sovereignty of any State by such a process as that of the reconstruction acts. Those acts were not such an enforcement of the provisions of the amendment as the amendment itself contemplated. Its provisions could be enforced after, but not before, it had become part and had been officially proclaimed to be a part of the Constitution.

"Resuming now the thread of the narrative, it is to be noted that the fourteenth amendment, proposed on the 16th of June, 1866, had not been acted on when the reconstruction acts were passed. When it was acted on by the States there were thirty-seven States in the Union, and the mode in which the Secretary

of the United States under this amendment of the Constitution, it must appear that he was, at the moment of his birth, subject to the jurisdiction of the United States.

It is agreed that his parents were, at that moment, subject to the jurisdiction of the Emperor of China.

of State proclaimed the result throws a very strong light on the nature of the proceeding in six of the States, namely, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Mr. Seward, a cautious statesman, was Secretary of State under President Johnson, as he had been under President Lincoln. It was his official duty, under an act of Congress passed April 20, 1818, to certify whether an amendment had, by being duly ratified, become a part of the Constitution.

"His proclamation bearing date the 20th of July, 1868, declared that from official documents on file in his Department, the fourteenth amendment had been ratified by the 'legislatures' of the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Iowa (23 States), and that in the six States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama it had been ratified '*by newly constituted and established bodies avowing themselves to be and acting as the legislatures respectively*' of those States.

"This remarkable difference in the language used to describe the two groups of the ratifying bodies was designed. The Secretary could not affirm that the 'newly constituted and established bodies' in the six States were the 'legislatures' of those States. He could only describe them as bodies '*avowing themselves to be and acting as the legislatures of those States respectively.*'"

In a note by the editor, it is added:

"Secretary Seward in his proclamation had to notice another doubtful question in regard to the ratification of two States, each of which had a legislature that was both a *de jure* and a *de facto* one. These were Ohio and New Jersey. It appeared from the official papers of those States on file in the State Department that after having ratified the amendment the legislatures of those

They could not in the same sense and to the same extent be subject to the jurisdiction of the United States, for no man in a political, any more than in a moral, domain can serve two masters. He may and must, when in a foreign jurisdiction, obey the divine injunction of the Master and "render unto Cæsar the things that are Cæsar's."

States had passed resolutions 'respectively withdrawing the consent of those States to the aforesaid amendment.' This, in the judgment of the Secretary, made it 'a matter of doubt and uncertainty whether such resolutions are not improper, invalid, and ineffectual for withdrawing the consent of the said two States, or either of them, to the aforesaid amendment.' Putting the result, therefore, hypothetically, the Secretary certified that, 'If the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of those States, which purport to withdraw the consent of those States from such ratification, then the aforesaid amendment has been ratified in the manner heretofore mentioned, and so has become valid to all intents and purposes as a part of the Constitution of the United States.'

"The requisite three-fourths of all the States in the Union was thus made up by counting the ratifications given by the six Southern States through bodies claiming to be 'legislatures' as valid and by adding thereto the ratifications of Ohio and New Jersey in order to make up the requisite number of twenty-nine States. If this mode of ratifying an amendment to the Constitution shall hereafter be regarded as a precedent, a construction will be put upon the amending power widely at variance with its terms and purpose. But, in truth, the whole process was one outside of the scope of the amending power, and it must necessarily be that when such a process of amendment is resorted to it must depend on future events, whether an amendment thus purporting to have been adopted is to be regarded as having become valid under the principles of public law, which are deemed to cure irregularities in and departures from the legal and constitutional method of public action."

But we have seen that this court, as well as the Executive Departments of the Government, have solemnly construed this clause of the amendment to mean, not partially or in a limited sense, but fully and completely, subject to the jurisdiction. The domicile of the parent is the domicile of the child. Their people are his people. Wherever they go he goes, and a law of this Government prohibiting citizens of the United States to leave our shores and commanding all Chinese persons or subjects to depart at once under penalty of death, would not be construed so as to operate the result of tearing a Chinese infant from its mother's breast and detaining it here as a citizen of the United States while the mother was banished as an alien and a foreigner from our coasts; and yet this would be the logical result of the construction given to this language by the decree from which this appeal was taken.

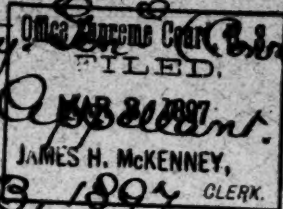
HOLMES CONRAD,  
*Solicitor-General.*





N<sup>o</sup>. 449. 132.

Reply Brief of Atty. Gen. China  
for Appellant.  
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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

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THE UNITED STATES, APPELLANT, }  
v. } No. 449.  
WONG KIM ARK. }

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF CALIFORNIA.

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REPLY BRIEF FOR THE UNITED STATES.

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## **REPLY BRIEF FOR THE UNITED STATES.**

I have just received the advance sheets of the brief of Mr. Maxwell Evarts, of counsel for appellee, and will venture to offer such reply to the views advanced by him as the brief space of time allowed me will permit and the character of the views may require.

## **II.**

*No common law of the United States.*

In commenting upon the opinion of Vice-Chancellor Sandford in my original brief, I was content to support the statement that "there can be no common law of the

United States" by a mere citation of authorities. But my learned opponent, referring to these, has sought to brush away the whole matter by the declaration that—

As we read the authorities, which have been cited by the solicitor-general, this court has simply held that there are no common-law offenses against the United States. (*United States v. Britton*, 108 U. S., 199-206.)

Of course I do not know *how* my learned friend has read the authorities. Certainly they are not hard to read or difficult to understand. And it is altogether inexplicable how they can be so read as to limit their application to "offenses against the United States." For example: In *Wheaton et al. v. Peters et al.* (8 Pet., 657), a case distinguished in the United States for the importance of the question decided, as well as for the eminent character of the parties concerned, this court, speaking through Mr. Justice McLean, said:

It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, custom, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption.

When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.

The learned counsel in referring to the case of *Smith v. Alabama* (124 U. S., 465), cited in my original brief, has

been considerate enough to suggest that: "If the counsel for the Government had read this case through he would have found on page 478 the following statement:"

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court in the application of the Constitution and the laws and treaties made in pursuance thereof has for its basis so much of the common law as may be implied in the subject and constitutes a common law resting on national authority.

Why the learned counsel supposes that the counsel for the Government had not read the case through, is not disclosed. But it may relieve his mind to be assured that the case was not only read through, but that the paragraph quoted was clearly *seen* through by the counsel for the Government, and was found to contain in its form or spirit nothing at variance with the position maintained, to wit, that there is no common law of the United States. What Mr. Justice Matthews there states was expressed by Mr. Justice Field in *B. and O. R. R. v. Baugh* (149 U. S., 394), when he said:

Indeed, there is no unwritten or general common law of the United States on any subject. (See Tucker's Blackstone, vol. 1, appendix, 422-433.) The common law may control the construction of terms and language used in the Constitution and

statutes of the United States, but creates no separate and independent law for them.

And this court did in *Minor v. Happersett* (21 Wall., 167) look to the common law to ascertain from its nomenclature who were meant by "natural-born citizens," and they found just what the Government is contending for here, that "it was never doubted that all children born in a country of *parents who were its citizens* became themselves, upon their birth, citizens also."

And it surely is not to be wondered at that in the numerous cases which counsel has cited from Massachusetts that the great judges of that great Commonwealth should have looked to the common law for the principles by which they were to be guided, because Massachusetts had by express statute incorporated the common law of England into the body of her jurisprudence.

## II.

### *What constitutes citizenship of the United States.*

Mr. Evarts has kindly stated for the United States the "two fundamental theories" upon which he has determined their "entire argument stands or falls."

The second of these "fundamental theories" is, "that the question of citizenship in a nation is to be determined by the rules of international law."

We have no doubt that if it were left to the learned counsel to construct the argument for the Government he would be fully able to contrive an opposing argument to overthrow it.

But the position taken in our original brief and adhered to in this is, that citizenship of the United States can not be maintained or ascertained by any reference to the common law of England.

And, again: That Wong Kim Ark, although born in the United States, did not thereby become a citizen thereof, because he was not born subject to their jurisdiction, by which we mean, as this court has held, *altogether, entirely, completely* subject to the jurisdiction of the United States.

It is true, to be sure, that in ascertaining the relation subsisting between Wong Kim Ark, the Chinaman, and the Government of the United States, recourse must be had to the principles of international law, as was done by this court in the Chinese cases in 149 U. S., 724, where, speaking through Mr. Justice Gray, it said:

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or a longer time, are entitled, so long as they are permitted by the Government of the United States to remain in the country, to the safeguards of the Constitution and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility.

And it may be noticed, further, that the court in that case, as it had done in several previous cases, took notice of those characteristics of the Chinaman which seemed to preclude him from actual citizenship here.

It said, on page 717 of that case:

After some years' experience under that treaty the Government of the United States was brought to the opinion that the presence within our territory

of large numbers of Chinese laborers of a distinct race and religion, *remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order and be injurious to the public interests*, and therefore requested and obtained from China a modification of the treaty.

Mr. Evarts, after referring to this case and to the protection which all Chinese subjects in this country enjoyed under the Fourteenth Amendment (he fails to note, however, that such enjoyment was secured to them by the express terms of the treaty between China and the United States), adds:

In return for this protection the father of Wong Kim Ark owed *allegiance* to the United States—that is to say, he owed obedience to them, etc.

Obedience is not allegiance. *Li Hung Chang*, during his recent visit to this country owed obedience to her laws, but was in no sense her liege man. He was connected with her by no bond or tie. Every foreign prince, or potentate, is, while residing within the United States, for however short a time, subject in a certain sense to their jurisdiction. He may not, while here, take the lives, property, or liberties of our people. The hand of the law will be laid upon him, at least to the extent of restraining such pernicious activity; and he, in turn, may claim the protection of the same laws to shield him from wrong and injury.



This word *allegiance* has been used improvidently and recklessly by writers and sometimes by judges without intelligent discernment of its appropriate sense.

The dictionaries refer to *acquired allegiance* as that binding the citizen who was born an alien but has been naturalized.

*Local allegiance* as that which is due from an alien while resident in a country in return for the protection afforded by the Government.

*Natural allegiance* as that which results from the birth of a person within the territory and under the obedience of the Government. (*Bourrier verb.*)

It is a fact agreed as to Wong Kim Ark "that his father and mother were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer." These parents of Wong Kim Ark were temporary sojourners in this land, subject to its jurisdiction only in the sense and to the extent that any other subject of the Emperor of China, crossing the continent in transitu from Europe to Asia, would be, owing to its laws no further obedience and claiming from them no further protection than the rapid-transit tourist might claim; they owed it no allegiance beyond the "local allegiance" above defined.

In *Carlisle v. United States* (16 Wall., 148), alien subjects of Great Britain, residing in the State of Alabama during the late civil war, furnished to the Confederate Government saltpeter, under a contract with the superintendent of a niter mining district, to be used for the manufacture of gunpowder for the Confederate army.

In 1864 they were the owners of cotton stored on a plantation in Alabama, which cotton was seized by naval officers of the United States and turned over to an agent of the Treasury Department, by whom it was sold and the proceeds paid into the Treasury. These British subjects sued in the Court of Claims, under the act of Congress, to recover the proceeds of this cotton. The court found that the claimants were the owners of the cotton, and that it had been seized and sold and the proceeds paid into the Treasury. They also found the facts above recited as to claimants' connection with the Confederate Government and dismissed their petition. Mr. Justice Field, in delivering the opinion of the court, said:

The claimants were resident in the United States prior to the commencement of the rebellion; they were therefore bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws.

And then, quoting from Wildman's Institutes on International Law, "all strangers are under the protection of the sovereign while they are within his territories and owe a temporary allegiance in return for that protection," the learned justice adds:

By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection which he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. *The citizen or subject owes an absolute and permanent allegiance to his*

*government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, while domiciled in the country, owes a local or temporary allegiance, which continues during the period of his residence.*

Mark now. It is the *citizen* who owes an absolute and permanent allegiance as distinguished from the mere sojourner who owes a local and temporary allegiance. To which of these classes does the Constitution refer in the Fourteenth Amendment, when it declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside?"

To which class does it refer as "subject to the jurisdiction thereof?"

We have seen that in a limited and restricted sense *all* persons, whether citizens or aliens, are subject to the jurisdiction of the United States while resident in its territory.

If *all* persons who are born in the United States are in a certain sense subject to its jurisdiction, is it a reasonable or decent construction of the Fourteenth Amendment to hold that the words "subject to the jurisdiction thereof" were used in this restricted sense? If so, why have used the phrase at all when the effect would have been the same without it?

Manifestly citizenship was predicated, not of those who were born in the United States, but only of so many of those thus born as were "subject to the jurisdiction thereof." That, as we have shown in the original brief, it was agreed

by Senators Trumbull, Reverdy Johnson, Howard, and Williams, when this amendment was proposed in the Senate, meant "*fully and completely* subject to the jurisdiction of the United States." Or, as Mr. Justice Field says in the opinion above quoted, "the *citizen* owes an absolute and permanent allegiance," as distinguished from the alien, who owes a local and temporary allegiance.

The learned counsel recognizes the force of this view, and the only *tabula in naufragio* that he can lay hold upon is that the restrictive phrase "subject to the jurisdiction thereof" was intended to refer to the children of foreign ambassadors and the American Indians.

The learned counsel quotes from the Civil Rights Act, section 1992, Revised Statutes :

All persons born within the United States and not subject to any foreign power, are declared to be citizens of the United States.

And adds :

We do not see what substantial distinction can be drawn between the words of the civil rights bill and the clause of the Fourteenth Amendment.

And in this I fully concur.

They manifestly intend the same thing. They exclude the absurdity of a "double allegiance."

One who is born within the jurisdiction of the United States means one "not subject to any foreign power." It excludes the notion that one who is the subject of a foreign power can at the same time be a citizen of the United States.

We are not, as the learned counsel suggests, indulging in the refinement of mere subtle speculation, or seeking

to apply as a test some ingenious but impracticable theory. But, on the contrary, we are seeking to ascertain the meaning of this clause in the Fourteenth Amendment by the application of very familiar, plain, and simple rules of construction.

Before and at the time of the adoption of the Fourteenth Amendment a statute of the United States (sec. 1992, Rev. Stat.) defined citizenship. This statute and the constitutional provision, if not repugnant, must be construed together, and the phrases "subject to the jurisdiction thereof" and "not subject to any foreign power" must be taken to express the same thing.

But while this seems to be agreed to by the learned counsel in his brief, yet the argument of the brief is the other way, and seems to contend that the clause "subject to the jurisdiction thereof" was intended to express only what is true of every person who may be in the United States for however short a period.

But if, as insisted, birth alone in the United States made one a citizen thereof, why add the clause "subject to the jurisdiction thereof," unless that clause was intended as a limitation upon the general class of those born in the United States?

If all persons born here are citizens, and all persons who are here at all are subject to the jurisdiction, then it is no limitation; and the framers of the amendment and the legislatures that voted for its adoption are open to the charge of having very solemnly done a very unmeaning act.

Obviously, it meant what the existing statute declares, that only those persons born in the United States "not

subject to any foreign power" became thereby citizens of the United States.

It must then have been used with reference to persons who are *completely* and *entirely* and *absolutely* subject to the jurisdiction of the United States, and not subject to any foreign power.

But Wong Kim Ark's parents were the subjects of a foreign power and were not completely and absolutely subject to the jurisdiction of the United States. Wong Kim Ark, during his infancy, certainly partook of the nationality of his father.

The agreed statement of facts shows that Wong Kim Ark was born in the year 1873, but in what month it does not appear; that his parents returned to China in 1890; that Wong Kim Ark also went to China in 1890, when he could not have been over 17 years of age; that he returned to the United States on the 26th July, 1890, when he could not have been 18 years of age; that after his return, Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895.

Now, observe—

In all this agreed statement of facts the only *months* that are mentioned at all are those in which Wong Kim Ark returned to the United States. The month of his birth, and the months of his departure from the United States are nowhere stated.

If he was born in December, 1873, and returned to the United States in the year 1894, at any time before his birthday, he returned as an infant under 21 years of age.

But the statement of facts shows that he returned to the United States in 1890, when he could not have been 18 years of age.

He left the United States and returned to China in the year 1894 "upon a temporary visit and with the intention of returning to the United States, and did return thereto in the month of August, 1895," when the collector of customs refused to allow him to land.

It is not a fact agreed in this case, that Wong Kim Ark was 21 years of age when he departed the United States and returned to China in the year 1894.

It is not a fact agreed in this case, that Wong Kim Ark ever claimed to be a citizen of the United States after reaching the age of 21 years.

Born some time in the year 1873, he became of age some time in the year 1894.

The only act done by him in 1894 was to leave the United States and return to China. If he was then under age, he was obeying the will and following the person of his father. If he was over 21 years of age, he was, in the exercise of his manhood, evincing his purpose to elect China as his home.

Wong Kim Ark now claims to have been from his birth a citizen of the United States. The burden is upon him to make good his claim. The question may turn, in large part, upon the exact date when he reached

the age of 21 years. He alone had the means of proving the exact date of his birth, as he did prove the year of his birth. He, too, could have proved the exact date in 1894 of his departure for China, and could have had these dates among the facts agreed. He can not withhold proofs of actual facts and rely upon presumptions and inferences to establish those facts.

Ludwig Hansding was born in the United States. He went to Europe, and desiring to return to the United States, applied to their minister for a passport, which was refused, "on the ground that the applicant was born of Saxon subjects temporarily in the United States, and was never 'dwelling in the United States,' either at the time of or since his parents' naturalization, and that he was not, therefore, naturalized by force of the statute, section 2172, Revised Statutes."

In this case Frelinghuysen, Secretary of State, to Kasson, minister, said:

You ask, can one born a foreign subject, but within the United States, make the option after his majority and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by immigration and legal process of naturalization. Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth under circumstances implying alien subjection, establishes of itself no right of citizenship and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at



the time within the jurisdiction of the tribunal of record which confers that character. (2 Wharton's Digest, 399; Snow's Cases of International Law, 222.)

So the questions presented on this branch of the case are, Was Wong Kim Ark, by virtue of his birth alone "in the United States," made subject to the jurisdiction thereof within the meaning of the Fourteenth Amendment? If so, are not all other persons born within the United States in like manner subject to their jurisdiction?

If, then, the fact of birth renders them subject to jurisdiction, what is the significance and what the necessity of the clause "subject to the jurisdiction thereof" in the amendment?

Suppose a son is born to the Emperor and Empress of Germany during a temporary visit to this country, is he born subject to the jurisdiction of the United States and consequently a citizen thereof? If so, suppose he should return to this country when between the age of 18 and 21, would he not be liable in time of war to be drafted as a private soldier in the United States Army?

Ludwig Hausding was in identically the predicament of Wong Kim Ark.

Each was born of nonnaturalized alien parents within the United States.

Each left the United States and returned to his father's country.

Each sought to come again into the United States in the character of citizens thereof, and each was denied by the officers of the Government the right and privilege belonging to that character.

The language employed by Secretary Frelinghuysen in approving the conduct of Minister Kasson is essentially repugnant to the view now urged by counsel for Wong Kim Ark. According to that view, birth alone within the United States is sufficient. But Mr. Frelinghuysen said "that the fact of birth under circumstances implying alien subjection establishes of itself no right of citizenship. What were the circumstances implying alien subjection? None other certainly than the fact that his parents were unnaturalized, were 'Saxon subjects temporarily in the United States.'" But so were Wong Kim Ark's parents. They were not only not naturalized, but under the laws of the United States could not become so.

Hausding may have left the United States intending to return, as did Wong Kim Ark. But while Hausding could have returned and become naturalized here, Wong Kim Ark could not; the law forbade it.

The act of October 1, 1888, declared that from and after its passage it should be unlawful for any Chinese laborer who at any time before had been, or was then, or might thereafter be, a resident within the United States, and who had departed, or might depart therefrom, and should not have returned before its passage, to return to or remain in the United States. And this court has rigorously enforced that statute in *Wan Shing v. United States* (140 U. S., 424).

He could not escape on the ground that he was the child of an ambassador or a slave Indian. And yet Mr. Justice Swayne, in *United States v. Rhodes* (Ab. U. S.

Reports), to which Mr. Evarts cites us in his brief (p. 34), declares that these are the only two exceptions to the rule.

All such absurd results are avoided only by giving to the clause "subject to the jurisdiction thereof" the meaning which the statesman who framed it declared it was intended to have—that is, subject to the complete, entire, and absolute jurisdiction thereof.

### III.

#### *Lynch v. Clark further considered.*

In my original *cf* in this case attention was called to the fact that the case of *Lynch v. Clark*, decided by Assistant Vice-Chancellor Sandford, 1 Sand. Ch. Rep., 583, in 1844, has been made the basis of every subsequent decision of this question by the inferior Federal courts, by the Attorneys-General, and by many writers.

Attention was further called to the fact that in the case of *Munro v. Merchant* (26 Barb., Sup. Ct. R., decided in January, 1858) a grave doubt was intimated as to the soundness of the views of Chancellor Sandford.

In May, 1860, the case of *Ludlam v. Ludlam* was decided by the supreme court of New York. (31 Barb., 486.) In that case Richard L. Ludlam, a native-born citizen of the United States, went to Peru in 1822, and in 1828 married a Chilean woman, resident in Peru. Of this marriage a son, Maximo, was born in Lima in 1831.

In 1837 Richard L. Ludlam returned to the United States, with his wife and children, with the intention of residing here.

The plaintiff in this suit was born in New York in 1837, and brought this action against her father's executors and her brother, Maximo, to compel the executors to pay over to her, to the exclusion of Maximo, the proceeds of the sale of certain real estate in New York, which had descended from Thomas R. Ludlam, a brother of Richard L. Ludlam, to the children of Richard as heirs at law, the contention of the plaintiff being that under the statute of descents of New York aliens could not inherit; that Maximo, her brother, was an alien, by reason of his birth in Peru, and hence could not inherit these lands; and that the proceeds of the sale thereof, so far as applicable to the heirs of Richard L. Ludlam, must be applied to the plaintiff alone, to the exclusion of her brother.

The Supreme Court, reversing the decision of the lower court, held that Richard L. Ludlam was a merchant temporarily residing abroad, intending at some future time, although at a time not defined, to return to the United States; that he was not expatriated, and had never ceased to be a citizen of his native country; that his son, though born in Peru, was a citizen of the United States and entitled to inherit here. The court say (p. 503):

It may be objected that the country in which such children are born might claim them as citizens by reason of their birth. I apprehend not when the residence of the parents was merely temporary and when the children were removed before their majority.

And, again :

That as the universal maxim of the common law is *partus sequitur patrem*, it is sufficient for the application of the doctrine just stated that the father should be a subject lawfully and without breach of his allegiance beyond the sea, no matter what may be the condition of the mother.

The "doctrine just stated" being that—

By the common law, when a subject is traveling or sojourning abroad, either on the public business or on lawful occasion of his own, with the express or implied license of the sovereign, and with the intention of returning, as he continues under the protection of the sovereign power, so he retains the privileges and continues under the obligation of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, *and are an exception to the rule which makes the place of birth the test of citizenship.*

The court in this case do, to be sure, cite the case of *Lynch* against *Clarke*, but only to call attention to the fact that the learned assistant vice-chancellor reached his remarkable conclusions by a process of reasoning which confounded arguments made by counsel at the bar with opinions delivered from the bench. (See pp. 501-502.) And it may, perhaps, be worthy of note that the opinion of Mr. Justice Swayne in *United States v. Rhodes*, relied on by Mr. Evarts, was delivered in 1866, and rests, in large part, upon the opinion of the chancellor in *Lynch v. Clarke*. (See 1 Abbott's U. S. Rep., 40.)

If it be true, as held in *Lynch v. Clark*, that there is a "national law" of the United States, outside of and

higher than the Constitution and the statutes, under which birth alone in the United States makes one a citizen thereof, why was it that as long ago as April 14, 1802, the Seventh Congress enacted—

That the children of persons duly naturalized under any of the laws of the United States or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the said States under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States. (2 Stat. L., p. 155, sec. 2172, Rev. Stat.)

If birth alone makes citizenship under Chancellor Sandford's "National Law of the United States," why all the conditions and limitations of this statute? Why this statute at all? Obviously, it can not stand with Chancellor Sandford's national law; one or the other must fall.

Again: On February 10, 1855, Congress enacted (10 Stat., 604)—

That persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States whose fathers were or shall be at the time of their birth citizens of the United States shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however*, That the

rights of citizenship shall not descend to persons whose fathers never resided in the United States.

That is, that the children of the citizens of this country, born abroad, are themselves citizens of this country; although under Chancellor Sandford's National Law, which is supposed to run with this statute, children of alien parents born in this country lose the nationality of their father and become citizens of the United States. That is, that the maxim *partus sequitur patrem* shall be enforced as to citizens of the United States abroad, but will not be recognized as to alien citizens here.

An intelligent writer on this subject, in the Washington Law Reporter of November 29, 1884, says:

Generally, no nation considers as aliens the children of its citizens or subjects born abroad; but, on the contrary, they are deemed to be citizens or subjects. Now should the common-law rule prevail in such country, where such children are born, it is evident that there would arise an immediate conflict between the place of birth and the country of the father which might lead to serious consequences. Inasmuch as the country where such persons were born claims as citizens or subjects persons born abroad whose fathers were citizens or subjects at the time of such birth, it should, upon principle, reciprocally recognize the right of a foreign nation to claim as citizens or subjects the children born abroad whose fathers at the time of such birth were citizens or subjects of such foreign nation.

Mr. Evarts, in his brief (p. 56), cites *Dupont v. Pepper*, (1 Harper's, ch. 11), where the language used was—

The character of a natural-born subject, anterior to any of the statutes, was incidental to birth alone.

And he insists that "this part of the decision of the South Carolina court was not reversed by this court when the case was brought here by writ of error under the title of *Shanks v. Dupont* (3 Pet., 248).

But it will be seen by reference to the opinion of Justice Story in 3 Peters that the question was controlled by the treaty of peace of 1783, the court holding that Mrs. Shanks, although a native of the State of South Carolina, having married a British subject and voluntarily placed herself under British protection, and adhering to the British side, was deemed by the British Government to retain her allegiance and to be to all intents and purposes a British subject. But she acquired by inheritance title to a moiety of her father's estate in South Carolina while she was a citizen of South Carolina. She did not become an alien until after the death of her father.

So the question presented in this case was not involved in that.

In resorting to cases in which questions of inheritance of property are involved for light to guide us in determining questions of citizenship care must be taken to avoid being misled by confounding two things which have no relation to each other, to wit, the laws of inheritance and the laws of citizenship. They are illustrated by two distinct maxims of the law, *partus sequitur ventrem*, which defines the ownership of property, and *partus sequitur patrem*, which defines their civil status.

*Ex parte Reynolds* (5 Dill. Cir. Ct. R., 394) arose on a petition for *habeas corpus* for the discharge of James E. Reynolds, committed for murder of Puryer.



The case turned upon the question whether Mrs. Pur-  
yer, the wife of the murdered man, was an Indian or a  
white woman, the court saying:

Is Puryer an Indian? He is not by blood. Is  
he by marriage? What is the status of his wife?  
If she is not an Indian in law, then he is not made  
a Choctaw by marriage with her; and if not, the  
question of his residence at the time he was killed  
cuts no figure in the case. For if he was a white  
man in law and was killed in the Indian country  
by Reynolds, although Reynolds may have been an  
Indian, this court has jurisdiction under the treaty.

The court then passed to the consideration of the legal  
status of the Choctaw Indians and say (p. 402):

If the Government of the United States has  
never recognized them as subject to its jurisdiction,  
and they have consequently never been treated as  
citizens, they occupy the same position before the  
law as though they were citizens of a power entirely  
independent of us, or were the people who were  
the citizens of a foreign power. If this be true,  
when the question arises as to what people a person  
belongs, what rule is to govern in the solution of  
the problem? \* \* \*

In the case of the *United States v. Sanders*  
(Hempst., 486), the court held that the quantum of  
Indian blood in the veins did not determine the con-  
dition of the offspring of a union between a white  
person and an Indian, but further held that the con-  
dition of the mother did determine the question.  
And the court referred to the common law as au-  
thority for the position that the condition of the  
mother fixed the status of the offspring. The court  
is sustained in the first position by the common law

and also in the last position, if applied to the offspring of a connection between a freeman and a slave, upon the principle handed down from the Roman civil law that the owner of a female animal is entitled to all her brood, according to the maxim, *partus sequitur ventrem*. But by the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule *partus sequitur patrem* prevails in determining their status. (1 *Bourvier's Institutes* 198, sec. 502; 31 *Barb.*, 486; 2 *Bouv. Law Dict.*, 147; *Shanks v. Dupont*, 3 *Pet.*, 242.)

This is the universal maxim of the common law with regard to freemen—as old as the common law, or even as the Roman civil law, and as well settled as the rule *partus sequitur ventrem*—the one being a rule fixing the status of freemen, the other being a rule defining the ownership of property; the one applicable to different political communities, or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom, the other defining the condition of offspring which had been tainted by the bondage of the mother.

And this view was subsequently taken by Judge Ross in *United States v. Ward*, in the circuit court southern district of California (42 *Fed. Rep.*, 320).

On the whole, we submit that Assistant Vice-Chancellor Sandford's opinion, in *Lynch v. Clark*, exhibits more of knowledge than of wisdom; and this display of knowledge has doubtless led astray the judges and Attorneys-General who have relied on that case as the ground of their conclusions.

It is dangerous, in that it seeks to set up an unwritten law in this land higher than the Constitution and of superior authority to the statutes.

It is erroneous in that the whole structure of its argument rests upon the notion of an unwritten "national law" as its corner stone.

It is absurd, logically, in that it holds that title to real property situate within the several States of the Union passes by inheritance, not according to the law of the State where situate, but according to some impalpable, unwritten Federal law.

It confounds the principles upon which rest the rights of property with those which determine the civil status of men.

Its doctrines have been subsequently repudiated by the higher courts of the State in which it was decided, and are inconsistent with the views repeatedly announced by this court.

HOLMES CONRAD,  
*Solicitor-General.*

○



*Ex parte*  
*Wong Kim Ark*  
*Case No. 185*  
*October Term, 1895*  
**Supreme Court of the United States,**

OCTOBER TERM, 1895.

THE UNITED STATES,

Appellant,

vs.

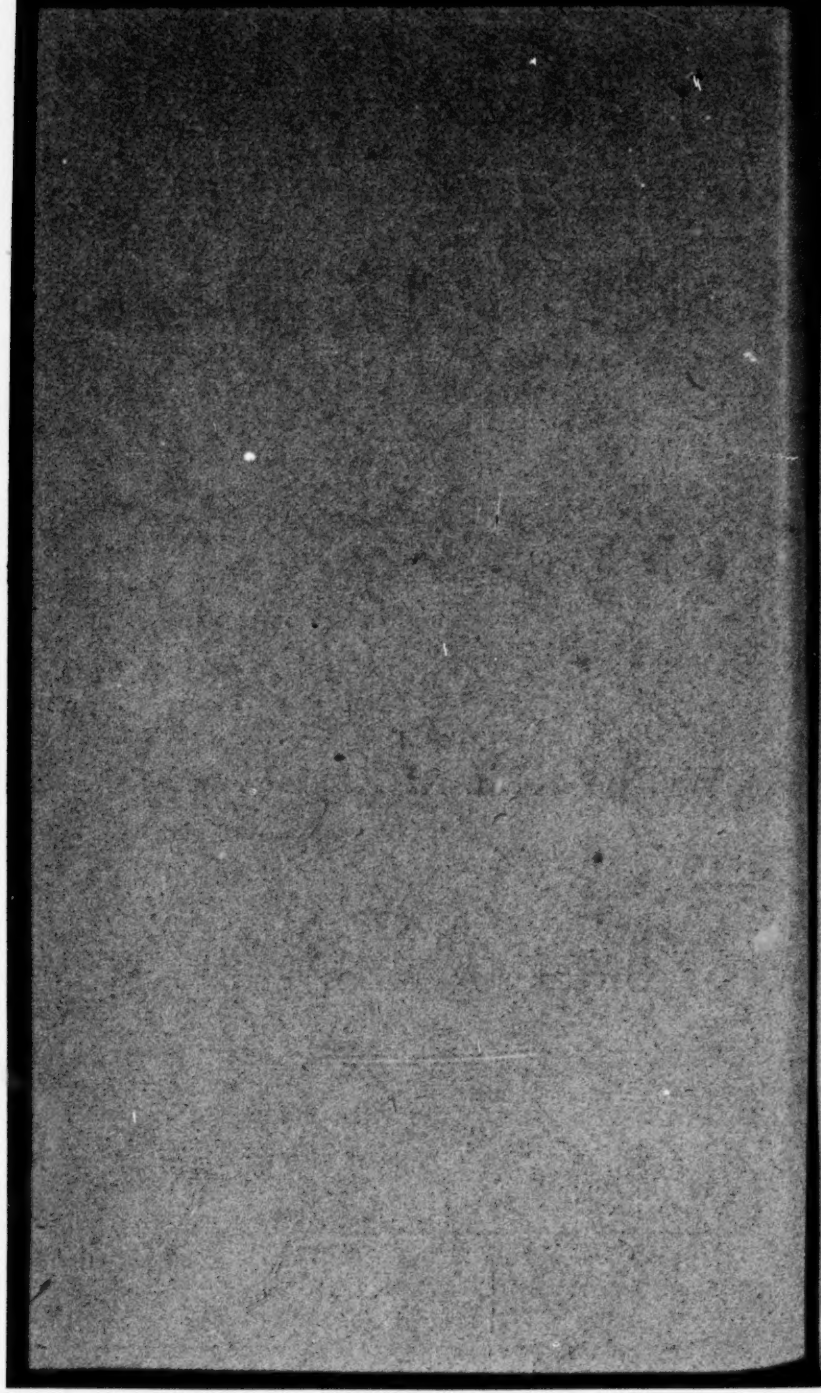
WONG KIM ARK,

Respondent.

BRIEF OF RESPONDENT.

THOS. D. RIORNAN,

Attorney for Respondent.



IN THE  
SUPREME COURT  
OF THE  
UNITED STATES.

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UNITED STATES OF AMERICA,

*Appellant,*

VS.

WONG KIM ARK,

*Respondent.*

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STATEMENT OF THE CASE.

In August, 1895, Wong Kim Ark arrived on the steamship "Coptic," at the port of San Francisco, and demanded permission to land on the ground that he was a native born citizen of the United States. The collector of customs refused to permit him to enter this country solely on the ground that he was not a citizen of the United States. Thereupon a petition was presented to the district court of the United States, alleging that Wong Kim Ark was unlawfully restrained of his liberty, and praying that a writ of habeas corpus issue directed to the collector

of customs and the general manager of the Occidental and Oriental Steamship Company, acting under his authority. The writ was accordingly issued, and before the hearing of the case, by leave, an amended petition was filed on behalf of Wong Kim Ark.

The substantial averments of this petition, which are not controverted, in addition to stating the facts of the unlawful detention, are: that the father and mother of Wong Kim Ark were and are persons of Chinese descent, and subjects of the emperor of China, and in the year 1873, and for a long time prior thereto, and more especially at the date of the birth of Wong Kim Ark, were domiciled residents of the United States, and had therein a continued, established and permanent residence in the city and county of San Francisco, state of California, and had come to the United States in pursuance of the invitation extended to them, and at that time to all other persons of the Chinese race, by the provisions of the treaty between the United States of America and the Tz Tsing Empire of the 18th day of June, 1858, and the additional articles thereto, concluded and signed on the 28th day of July, 1868 (Burlingame Treaty); that during their residence in the city and county of San Francisco, and in the year 1873, Wong Kim Ark was born in said city and county; that his parents continued to have and maintain their residence in the United States, at said city and county, until the year 1890, when they departed for China, and that during their said residence they were not engaged in any diplomatic or official function under



the emperor of China, and were only engaged in the prosecution of business.

The petition further avers that in the year 1890 Wong Kim Ark departed for China upon a temporary visit with the intention of returning to the United States, and did return thereto on the 26th day of July, 1890, on the steamship "Gaelic," and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native born citizen of the United States; that after his said return he remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, *animo revertendi*, and returned in August, 1895.

The petition further recites that ever since the birth of Wong Kim Ark he has had but one residence, a residence at said city and county of San Francisco, state of California, and within the dominion and jurisdiction of the United States, and that he has never changed or lost said residence, or gained or acquired another residence; that he was born within the dominion, power, protection and obedience of the United States, and subject to the jurisdiction thereof, that he has always subjected himself to the jurisdiction and dominion of the United States, and yielded thereto direct and immediate allegiance, and has been taxed, recognized and treated as a citizen of the United States, and that he has never lost his said nationality as a citizen of the United States, or lost or renounced his allegiance thereto, or his said citizenship, either by expatriation, change of residence,

oath of allegiance, or in any other manner whatsoever, or at all. Finally the petition avers that Wong Kim Ark has never done or committed any act or thing to exclude him from the United States, and that the acts of congress inhibiting the immigration of Chinese to this country are not applicable to him, being a native born citizen of the United States.

Upon the hearing which followed, the case was argued and submitted upon an agreed statement of the facts substantially as above stated; and the court held, as conclusions of law, that Wong Kim Ark was a native born citizen of the United States, and that his detention, therefore, was illegal, and directed his discharge from custody.

From this order and judgment an appeal was taken to this court by the United States.

## BRIEF OF ARGUMENT.

### I.

By the common law, birth within the dominions and jurisdiction of the United States of itself creates citizenship.

*Lynch vs. Clarke*, 1 Sandf. Ch. 583;

*McKay vs. Campbell*, 2 Saw. 119.

### II.

The fourteenth amendment to the constitution of the United States is only declara-

tory of the common law rule; that amendment was adopted to declare and enforce it uniformly throughout the United States and the several states.

- Fourteenth Amend. U. S. Const.;  
 Rev. Stat. U. S., sec. 1992;  
 Story on the Const., 5th ed., chap. xlvii.,  
 The Fourteenth Amendment, by Hon. T. M.  
 Cooley;  
*U. S. vs. Cruikshank*, 92 U. S. 542;  
*Stauder vs. West Virginia*, 100 U. S. 303;  
*Neal vs. Delaware*, 103 U. S. 370;  
*Bush vs. Kentucky*, 107 U. S. 110;  
*Civil Rights Cases*, 109 U. S. 3;  
*Elk vs. Wilkins*, 112 U. S. 94;  
*McKay vs. Campbell*, 2 Saw. 119;  
*In re Look Tin Sing*, 10 Saw. 353;  
*Ex parte Chin King*, 13 Saw. 333;  
*In re Yung Sing Hee*, 36 Fed. 437.

### III.

The words in the fourteenth amendment, "subject to the jurisdiction thereof" do not exclude the appellee from being a citizen. He is not within any of the classes of persons excepted from citizenship; and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

Mr. Justice Field, *In re Look Tin Sing*;  
10 Sawyer, 353.

#### IV.

The word "citizen," as employed in the fourteenth amendment, includes those who do not as well as those who do possess the privilege of the elective franchise.

Story on the Const., 5th ed., vol. 2, sec. 1932;  
*Minor vs. Happersett*, 21 Wall, 163;  
*Ex parte Virginia*, 100 U. S. 339;  
*Virginia vs. Reeves*, 100 U. S. 313.

#### V.

The laws excluding immigrants who are Chinese laborers are inapplicable to a person born in the United States, and subject to its jurisdiction, even though his parents were not citizens, and being Chinese, were not entitled to become citizens under the naturalization laws.

*In re Look Tin Sing* (*supra*), 10 Saw. 353;  
*Gee Fook Sing vs. U. S.*, 49 Fed. 146; 7 U. S.  
App. 27, and 1 C. C. Ap. 211.

#### VI.

This court should affirm the order and judgment of discharge.

"From the law as announced and the facts as stipulated, I am of opinion that Wong Kim Ark is a citizen of the United States within the meaning of the citizenship clause of the fourteenth amendment. He has not forfeited his right to return to this country. His detention, therefore, is illegal."

Opinion of Morrow, J., in re Wong Kim Ark,  
Fed. Rep., vol. 71, No. 3, February 18,  
1896, p. 392.

THOS. D. RIORDAN,

Attorney for Respondent.

## ADDENDA.

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**Extracts from Opinion of Mr. Justice Field, that Chinese born in the United States are citizens thereof.**

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The first section of the fourteenth amendment to the constitution declares that "all persons born or "naturalized in the United States, and subject to the "jurisdiction thereof, are citizens of the United States "and of the state wherein they reside." This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words "subject "to the jurisdiction thereof." They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them, when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This extra-territoriality of their residence secures to their children born here

all the rights and privileges which would inure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, whilst within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States.

The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognized the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British crown, as belonging to every human being—God-given and inalienable—the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country although there are judicial dicta that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent when he published his

Commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as citizens those belonging to our race, who, coming from other lands, manifest attachment to our institutions, and desire to be incorporated with us. So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that as soon as they are naturalized they are deemed entitled, with the native-born, to all the protection which the government can extend to them wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here is accorded to them as well as to the native-born, to transfer their allegiance from our government to that of other states.

In the opinion of Attorney-General Black, in the case of a native Bavarian, who came to this country, and, after being naturalized, returned to Bavaria, and desired to resume his status as a Bavarian, this doctrine is maintained. "There is," he says, "no statute "or other law of the United States which prevents "either a native or naturalized citizen from severing "his political connection with this government, if he "sees proper to do so in time of peace, and for a purpose not directly injurious to the interests of the "country. There is no mode of renunciation prescribed. In my opinion, if he emigrates, carries his "family and effects with him, manifests a plain in-



"tention not to return, takes up his permanent residence abroad, and assumes the obligations of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States, and I do not think we could, or would, afterward claim from him any of the duties of a citizen."

(9 Opin. Atty.-Gens. 62.)

The doctrine thus stated has long been received in the United States as a settled rule of public law; and in the treaty of 1868 between China and this country, the right of man to change his home and allegiance is recognized as "inherent and inalienable." (16 Stats., p. 740. art. 5.) And in the recital of an act of congress passed nearly at the same time with the signing of the treaty, this right is assumed to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and in the body of the act, "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation," is declared to be "inconsistent with the fundamental principles" of our government. (13 Stats. 223; R. S., Sec 1999.) So, therefore, if persons born or naturalized in the United States have removed from the country and renounced, in any of the ordinary modes of renunciation, their citizenship, they thenceforth cease to be subject to the jurisdiction of the United States.

With this explanation of the meaning of the words in the fourteenth amendment, "subject to the

jurisdiction thereof," it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship; and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country so far as the white race is concerned, but also to overrule the doctrine of the Dred Scott case, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States nor capable of becoming such. (19 How. 393.) The clause changed the entire status of these people. It lifted them from their condition of mere freedmen and conferred upon them, equally with all other native-born, the rights of citizenship. When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the status of either as citizens under the amendment in question.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the domin-

ions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by Assistant Vice-Chancellor Sandford in *Lynch vs. Clarke*, found in the first volume of his reports. (1 Sandf. 583.) In that case one Julia Lynch, born in New York, in 1819, of alien parents, during their temporary sojourn in that city, returned with them the same year to their native country, and always resided there afterwards. It was held that she was a citizen of the United States.

After an exhaustive examination of the law, the vice-chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen; and added, that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding, he mentions the fact, that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his parents were citizens or foreigners; it is enough that he was born here, whatever was the status of his parents. He shows also that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of the states, and establishes conclusively that there is on this subject a concur-



FEB 27 1967

THE UNITED STATES OF AMERICA

WONG KIM ARK.

**Appeller:**

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF CALIFORNIA.

## BRIEF OF THE APPELLEE.

MAXWELL EVARTS

*Of Counsel for Appeller:*



# Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 449.

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THE UNITED STATES OF AMERICA, APPELLANT,

vs.

WONG KIM ARK, APPELLEE.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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## **BRIEF OF THE APPELLEE.**

### **Statement.**

Wong Kim Ark, the petitioner below, was born in 1873 in the City of San Francisco, California, of Chinese parents. In 1890 he left this country for the first time and went on a temporary visit to China with his parents. In the same year he returned to the United States, and was, without question, permitted to land. He remained in the United States until 1894, when he made another temporary visit to China, and returned to this country in August of the following year on the steamer "Coptic" of the

Occidental and Oriental Line. Upon his arrival in the United States he made application to the Collector of Customs at the port of San Francisco for permission to land. This application was denied on the ground that he was a Chinese laborer, debarred by law from entering this country, and was not, as he claimed, a citizen of the United States. He then applied to the United States District Court for the Northern District of California for a writ of *habeas corpus*, alleging in his petition that he was a citizen of the United States, and was restrained of his liberty, without due process of law, by the Collector of Customs of the Port of San Francisco, and by the General Manager of the Occidental and Oriental Steamship Company, acting under the direction of said Collector of Customs. Upon the return of the writ of *habeas corpus* the petitioner was discharged, the Court below being of opinion that he was a citizen of the United States, and therefore improperly restrained of his liberty. From this judgment the Government has appealed.

The case below was heard upon an agreed statement of facts, which will be found at pages 10 and 11 of the record, and is as follows:

## I.

That the said Wong Kim Ark was born in the year 1873 at No. 751 Sacramento street, in the City and County of San Francisco, State of California, United States of America, and that his mother and father were persons of Chinese descent, and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

## II.

That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile



and residence therein at said City and County of San Francisco, State aforesaid.

### III.

That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China:

### IV.

That during all the time of their said residence in the United States as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

### V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

### VI.

That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on the 26th day of July, 1890, on the steamship "Gaelic," and was permitted to enter the United States by the Collector of Customs upon the sole ground that he was a native-born citizen of the United States.

## VII.

That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China, upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the Collector of Customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

## VIII.

That said Wong Kim Ark has not, either by himself or his parents, acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

**Argument.**

The single question presented upon this appeal is this: Are the children born in this country of alien residents not connected with the diplomatic service citizens of the United States?

It is a mere chance that the petitioner below was a Chinaman, and that fact has not, so far as we can conceive, any bearing upon the case at bar. Whether Wong Kim Ark shall be permitted to land in this country, or what the rights of the Chinese race may be, is of little importance. The case, as we understand it, which is before this Court for decision, is much larger and broader, and the question now up for discussion is whether the children born in this country to any alien resident are citizens of the United States, without regard to the country from which their parents

came, and irrespective of whether they are of English, Irish, French, German or any other extraction?

As the District Court said in its opinion (Record, p. 15) :

“ If the contention of counsel for the Government be correct, it will inevitably result that thousands of persons of both sexes, who have been heretofore considered as citizens of the United States, and have always been treated as such, will be, to all intents and purposes, denationalized, and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens, and whose right as such is not, and never has been, questioned, because birth within the country seems to have been recognized generally as conclusive upon the question of citizenship.”

The Fourteenth Amendment of the Constitution of the United States, so far as it is of interest in this case, is as follows :

“ All persons born \* \* \* in the United States and subject to the jurisdiction thereof are citizens of the United States.”

The petitioner, Wong Kim Ark, apparently conforms to the requirements of this amendment. The argument of the Government is, however, that his parents were subjects of the Emperor of China, and that, therefore, he was not at the time of his birth “ subject to the jurisdiction ” of the United States, and that in consequence Wong Kim Ark cannot be a citizen, it being necessary, before a person can be a citizen of the United States by birth, that, at the time of, and coincident with, his birth, he should be “ subject to the jurisdiction thereof.”

The decision of this question would, therefore, seem to turn upon the meaning of the words “ subject to the jurisdiction thereof ” as used in the Fourteenth Amendment to the Constitution.

## Briefs of the Government.

Before proceeding to any independent discussion of this subject it will perhaps be useful to refer to the main points upon which the Government relies in support of its contention that Wong Kim Ark was not at the time of his birth "subject to the jurisdiction" of the United States.

It is substantially conceded that the Fourteenth Amendment is but declaratory of the law as it previously existed, and it is practically admitted that, since the adoption of the Fourteenth Amendment, every judicial decision directly upon the question in controversy has been adverse to the Government's present position.

It is, however, urged most earnestly by the Solicitor General and by Mr. Collins, the *amicus curiæ*, that this long-standing interpretation of who was a citizen of the United States is wrong, and has been wrong from the very beginning, in that the Courts have resorted to the common law to aid them in their decisions, while the question was really one of the law of nations. Further than that, the Government seriously presses the point that there is no common law in the United States, and that, therefore, in ascertaining the meaning of words used in the Constitution, but not there defined, it is not permissible to inquire how they were commonly understood by lawyers at the time of the adoption of the Constitution, or in other words what their meaning was at common law.

The two fundamental theories, therefore, now advanced by the Government, and upon which its entire argument stands or falls, are :

**FIRST.** That there is no common law in the United States.

**SECOND.** That the question of citizenship in a nation is to be determined by the rules of international law.

(a) Perhaps we do not fully understand the argument of the Government that there is no common law in the United States, but as we read the authorities which have been cited by the Solicitor-General, this Court has simply held that "there are no common law offenses against the United States" (*United States vs. Britton*, 108 U. S., 199-206).

This proposition is too well established to admit of dispute, but it is not clear how it can affect the present discussion. The question whether a man is "subject to the jurisdiction" of the United States is not, we take it, to be determined by the common law, but by the principles of the common law, which is a very different matter.

In other words, it has often been decided by this Court that, in determining the meaning of the words used in the Constitution and the statutes of the United States and not therein defined, it is both proper and necessary to seek in the common law, as the source and origin of our jurisprudence, their true definition; and the question fairly raised here is not whether there is a common law in the United States, but whether it is admissible, in construing and defining words used in the Constitution, to refer to the common law.

The case of *Smith vs. Alabama*, 124 U. S., 465, is referred to upon the brief of the Solicitor General in support of the proposition that there is no common law in the United States.

If the counsel for the Government had read this case through he would have found on page 478 the following statement:

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The code of

constitutional and statutory construction which therefore is gradually formed by the judgments of this Court in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis, so much of the common law as may be implied in the subject and constitutes a common law resting on national authority."

In *Moore vs. The United States*, 91 U. S., 270, the question before the Court was as to what rule of law should determine the admissibility of evidence in the Court of Claims. This Court said, page 273 :

" By what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? or is it to be governed by some system of law? In our opinion it must be governed by law, and we know of no system of law by which it should be governed other than the common law. *That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many Acts of Congress could not be understood without reference to the common law.*"

It was said in *Minor vs. Happersett*, 21 Wallace, 162-167 :

" The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens, became themselves upon their birth citizens also."

In *Gardner vs. Ward*, 2 Mass. Rep., 244, the question was as to the right of the plaintiff to vote. As

the Court said in its opinion "this question \* \* \* depends altogether upon this inquiry—whether H. Gardner was, at that time, a citizen of the United States or an alien."

This case was decided in 1805. Theophilus Parsons appeared for the plaintiff. Mr. Dane for the defendant. Mr. Dane was unsuccessful, and in the similar case of Kilham vs. Ward, 2 Mass., 236, he had Story as counsel. He was again unsuccessful. There is no doubt but that the cases were well presented in behalf of the defendants, yet it was held that the question of citizenship of the United States was to be decided by the principles of the common law. The Court said at page 245 :

*"In determining this question we are to be governed altogether by the principles of the common law, 'and from whatever source these may have been derived and in whatever form expressed, the substantial part of them is founded in reason and in nature of government.'"*

"I take it, then, to be established, with a few exceptions, not requiring our present notice, that a man born within the jurisdiction of the common law is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land, and becomes reciprocally entitled to the protection of that sovereign and to the other rights and advantages, which are included in the term 'citizenship.'"

In the case of Ainslie vs. Martin, 9 Mass., 454, 456 Chief-Justice PARSONS said :

*"Our statutes recognize alienage and its effects, but have not defined it. We must, therefore, look to the common law for its definition. By this law, to make a man an alien, he must be*

born without the allegiance of the commonwealth."

If it is permissible to look to the common law for the definition of "alienage" when used in a statute, it would seem to follow that it was equally permissible to look to the common law for the definition of "citizen" when used in the Constitution, and we submit that it is of little importance in the case at bar whether there is or is not a common law in the United States, so long as the proposition asserted in the foregoing authorities is sound, that resort can be had to the common law for the meaning of words found but not defined in the Constitution.

(b) The second theory of the appellant is that the question of citizenship in the United States is to be determined by the law of nations and not by the law of the United States.

We should have supposed it difficult to find a question more widely separated from the domain of international law than the status of a citizen in any country. It would seem as if the right of citizenship was for each country to determine for itself, and that any nation would guard with jealous interest the right to decide who should be its members. That is to say, it is a matter of local and national law, as distinguished from international law, and the United States would be the last to surrender the privilege of determining, by its own law, who were or were not its citizens.

"The answer to the question, Who is a citizen? is different in different States, and depends on the laws and constitution of each." (Aristotle, Politics, Book III., c. s. 2 and 3.)

This proposition of the government has, we think, arisen from a mistaken notion as to the true character of the question in this case, and it seems somewhat re-



markable that the Solicitor-General should take the position that the Government of the United States is to be administered, not in accordance with the laws of the United States, but in accordance with the law of nations, and that the vital question of who compose the great body of their citizens is to be determined, not by the law of the United States, but by the rules of international law.

In the case of *Scott vs. Sandford*, 19 How., 393, 451, Chief-Justice TANEY used the following language :

“ But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government and the rights of the citizen under it, are positive and practical regulations plainly written down. \* \* \* And no laws or usages of other nations, or reasoning of statesmen or jurists \* \* \* can enlarge the powers of the Government or take from the citizens the rights they have reserved.”

Mr. Justice STORY, in *Inglis vs. Trustees of the Sailors' Snug Harbor*, 3 Pet., 99, 162, when speaking upon the question of citizenship, said :

“ The ground of this doctrine is that each Government had a right to decide for itself who should be admitted or deemed citizens.”

Mr. Stanbery, then Attorney-General, said in *Warren's Case*, 12 Opin. Atty.-Gen., 319, 325 :

“ A question as to status or citizenship, if it arose in the United States, would be determined by our own law.”

The question in *Warren's case* was, whether a man born in Ireland, but naturalized as a citizen of the

United States, was entitled, when arraigned in a British court for the offense of treason felony, to the privilege of a jury *de medietate*, which would have been a jury composed half of British subjects and half of aliens from Great Britain born in the United States. This right was given by the British law only to an alien. The English Court, when Warren filed his plea demanding the privilege of a jury *de medietate*, decided that Warren was a citizen and subject of Great Britain by reason of his birth, and that he could not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country. This decision was acquiesced in by Mr. Stanbery, for the reason given by him that a question of citizenship must be determined by the law of the country in which the question is raised and not by international law, or, as he said at page 325: "*I have no hesitation in saying that we have here only a question of British law, and that Warren's condition as to alienage or citizenship for the purposes of this case is to be fixed by that law alone.*"

If it is possible for a man to be a citizen of a country by the law of that country, and a citizen of another country by the rules of international law, then the question which doctrine shall prevail is to be determined according to the manner in which it arises for decision, whether as an international question or simply as a local and national matter.

To put the idea sought to be conveyed in another form, if there is any conflict between the law of any country and international law, "the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation" (Greisser Case, 2 Whart. Int. Dig., 399).

As was said in the case of *Lynch vs. Clarke*, 1 Sand. Ch., 583, 660, in determining who was a citizen of this country.

"In reference to the argument that the United States should establish a rule on proper prin-

ciples, and which shall be just to other nations, it may be said that this is purely a matter of municipal regulation, in every country."

Lord Justice BRETT, in *Niboyet vs. Niboyet*, L. R., 4 Pr. Div., 1, 12, said.

"By the universal independence of nations, each binds by its personal laws its natural born subjects and all who may become its subjects."

It is not at all certain that this principle of International Law, as it is called, which is supposed to declare that a child born to aliens while residing in a foreign country takes the nationality of his father, is anything more than a name. As a matter of fact, no nation, so far as we have been able to ascertain, decides or pretends to decide the status of its citizens by any other law than its own.

It is true that different nations have different laws upon this subject, and the laws of some of these nations are more or less in accord, but there is no great unanimity among them.

England now holds to the rule that birth within its dominions makes a man a subject of the Queen, unless, if born of aliens, he elects the nationality of his parents (33 Vict., Chap. 14).

In France a similar doctrine prevails, and is as follows :

"The French law considers all children of foreigners born in France as French citizens, unless before coming of age they decline French citizenship. \* \* \* Otherwise they are amenable to obligatory military service and punishment as deserters if they endeavor to evade it" (49 Alb. L. J., 20).

In Denmark, Portugal and Holland the law is appa-

rently the same as that of France, as Lord Cockburn in his work on Nationality says, at pages 14 and 15, that birth within their dominions confers citizenship on the offspring of alien parents, subject to the right of the individual concerned to reject it at majority.

Another rule is adopted by Belgium, Spain, Italy, Greece, the Grand Duchy of Baden, Russia, Russia-Poland and the Ottoman Empire, where birth within their dominions confers citizenship on the offspring of alien parents on the right being claimed on certain specified conditions (Cockburn on Nationality, 14 and 15).

It is clear, therefore, that each country has enacted its own law as to who is or who is not its citizen, and has never fallen back upon any principle of international law for the decision of the question.

All that can possibly be argued from the state of the law of citizenship in the different countries of Europe is that it might be advisable for the people of the United States to pass a law or amend their constitution, if they saw fit, so as to conform with the laws of the majority of these countries, but we fail to see how the counsel for the government have shown that the status of a citizen was or ever can be determined in the Courts of a country by the law of nations or by any other law than its own. In other words, the question before this Court is not what is the proper policy for the United States to adopt, but what is the meaning of an amendment of their constitution, and the constitution must be interpreted, as we think, by the light of the principles of our own law and not by the law of other countries or the law of nations. "*The laws of the United States determine what persons shall be regarded as citizens, irrespective of such persons' pleasure or the laws or pleasure of any other government*" (State vs. Adams, 45 Iowa, 99, 101).

(c) It is conceded by the Government that this Court has never decided the question which arises upon this

appeal, but it is claimed by the Solicitor-General that the two decisions of *Elk vs. Wilkins*, 112 U. S., 94, and *The Slaughter-House Cases*, 16 Wall., 36, indicate that in the judgment of this Court a child born in the United States to alien parents is not a citizen thereof.

In the briefs of the appellant the greatest reliance seems to be placed upon the case of *Elk vs. Wilkins* (*supra*), in which it was held that the words of the Fourteenth Amendment, "subject to the jurisdiction thereof," referred to the time of the birth of the alleged citizen, and that if he was born a member of a distinct political community, although born within the limits of the United States, he could not be considered as born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. This Court therefore decided that John Elk, having been born of Indian parents, who had not abandoned their tribal relations, was at his birth a member of a distinct political community, and not then subject to the jurisdiction of the United States, and was therefore not a native-born citizen of this country and could only become a citizen thereof by naturalization.

This decision, as we understand it, simply emphasized the doctrine, long recognized in this country, that the Indians were and always had been independent nations. They were, it is true, within the geographical limits of the United States, but the different Indian Governments were considered as a nation or nations within a nation, and "were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white" (*Scott vs. Sanford*, 19 How., 393, 404).

By the Eighth Section of the First Article of the Constitution it was provided that "Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several States and with the *Indian tribes*."

In the early case of *Goodell vs. Jackson*, 20 Johnson's Reports, 693, 712, it is said :

"Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities."

In other words, the Elk case simply decided that an Indian, who himself voluntarily abandoned his tribal relations and became a member of the general body of the inhabitants of this country, occupied the same position as any other emigrant or alien, and could not insist that he had any other or greater rights because his place of birth was geographically within the limits of the United States. As Chief Justice TANEY said: "If an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people" (Scott vs. Sanford, 19 How., 393, 404).

The Elk case is in no way similar to the case at bar, and would seem to have little bearing upon the question of whether an alien's children born in the United States are citizens thereof. The Indian Elk was not in the position of Wong Kim Ark, but of Wong Kim Ark's father. They were both alien residents of this country.

A parallel situation to that of the appellee would have been the question of the citizenship of any children which might have been born to Elk after he had abandoned his tribe and become an alien resident of the United States.

No such question is directly decided by the Supreme Court in Elk vs. Wilkins, but in the opinion of Mr. Justice GRAY the case of United States vs. Elm, 23 Int. Rev. Rec., 419, was referred to with apparent approval.

In this latter case, which was decided by Judge

WALLACE, Circuit Judge of the Northern District of New York, the Indian, Elm, occupied the same position which children born to Elk after he had left his tribe would have held, and which Wong Kim Ark now holds, and it was decided that he was a citizen of the United States by reason of his birth.

The opinion of the Court in U. S. vs. Elm was in part as follows :

“ It is not enough to confer citizenship on the defendant that he was born in the United States, it must also appear that he was ‘ subject to the jurisdiction thereof ’ within the meaning of the Fourteenth Amendment.

“ In a general sense, every person born in the United States is within the jurisdiction thereof while he remains in the country. *Aliens, while residing here, owe a local allegiance, and are equally bound with citizens to obey all general laws for the maintenance of peace and order which do not relate specially to our own citizens, and they are amenable to the ordinary tribunals of the country.*”

Judge WALLACE then enumerates the classes of people in the United States who are not “ subject to the jurisdiction thereof ” and refers to the children of ambassadors and to Indians who maintain their tribal relations and are therefore regarded as “ distinct political communities.” He afterwards goes on as follows :

“ If defendant’s tribe continued to maintain its tribal integrity and he continued to recognize his tribal relations, his status as a citizen would not be affected by the Fourteenth Amendment ; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter

appear, and because of these facts \* \* \* he is a citizen within the meaning of the Fourteenth Amendment."

The only reasonable interpretation of *Elk vs. Wilkins* (*supra*) is that it decided one question only, viz: that a man born to parents, who were members of an Indian tribe at the time of his birth, was not at his birth "subject to the jurisdiction" of the United States, and was not therefore by reason of such birth a citizen thereof. This decision goes no further. If any other inference or conclusion could properly be drawn from this case, it would be that this Court, by its approval of *United States vs. Elm*, indicated that John Elk's children, born after he had left his tribe, and John Elk himself, if he had been born subsequent to the abandonment of their tribal relations by his parents, would have been citizens of the United States.

We therefore submit that *Elk vs. Wilkins* (*supra*) is no authority either for or against the proposition that a man born in the United States to alien parents resident therein is a citizen thereof.

There is nothing in the decision itself of the *Slaughter House Cases*, 16 Wall., 36, which would tend to show that this Court had in mind the question now before it, except the following statement (p. 73), made without any previous argument or reference to any authority:

"The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States."

These words were *obiter dicta*, and whatever force or value they may have, in the opinion of the counsel for the Government, is certainly weakened by the fact that Mr. Justice MILLER, in the very next paragraph (p. 74), said:



"Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, *but it is only necessary that he should be born \* \* \* in the United States to be a citizen of the Union.*"

This Court did not seem to think that what was said in the Slaughter House cases was to be considered as in any way a decision upon the present question, for in the subsequent case of *Minor vs. Happersett*, 21 Wall., 162-167, the Court speaking by Chief Justice WAITE declined to express an opinion upon the precise question involved in this case and said :

"Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents; as to this class there had been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction, are themselves citizens."

The examination of these cases of *Elk vs. Wilkins* and the Slaughter House Cases would seem to show that this Court has never considered whether birth in the United States of alien parents resident therein makes a man a citizen thereof, and to assist the Court in arriving at any conclusion upon this question it will be necessary to resort to some other source than its own decisions.

## POINT I.

**Wong Kim Ark at the time of his birth was "subject to the jurisdiction" of the United States within the meaning of the words as used in the Fourteenth Amendment to the Constitution.**

In considering this question it will not be without advantage to see at the outset just what the situation of the father of Wong Kim Ark was in this country at the time his son was born and what his relations were to this government.

He was, as appears by the agreed statement of facts, a subject of the Emperor of China, having a "permanent domicile and residence" in California, and the first inquiry which suggests itself is whether his position is in any way different from that of other aliens residing in the United States.

Prior to the passage of the Act of Parliament of 33 Vict., Ch. 14, a person born a British subject was not permitted to throw off or in any way escape from his allegiance to the crown. Once a subject of the King of Great Britain, he was always a British subject.

As was said by Mr. Stanbery in Warren's Case, 10 Opin. Atty. Gen., 319, 322 :

"According to English law, perfectly well established, a native-born citizen of Great Britain does not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country."

In Cockburn on Nationality, at page 63, will be found the following :

"At variance in this respect with the laws of all other civilized nations, the law of England

\* \* \* asserts, as an inflexible rule, that no British subject can put off his country or the natural allegiance which he owes to the Sovereign—even with the assent of the Sovereign; in short, that natural allegiance cannot be got rid of by anything less than an Act of the Legislature, of which it is believed no instance has occurred."

In *Deck vs. Deck*, 2 Sw. & Tr., 90, the question was as to the Court's jurisdiction over a matrimonial cause in which the plaintiff was an English woman, and the defendant a natural-born English subject, domiciled in the United States. The Court pronounced for the jurisdiction upon the ground that the defendant, "being a natural-born English subject, could not shake off his liability to the authority of the laws of his native country" (Syllabus).

The subject of Great Britain, therefore, who became a permanent resident of the United States was not permitted by the country of his birth to become the subject of any other nation. Was it, however, ever doubted that, though he failed to become naturalized, his children born to him here, were born within the jurisdiction of the United States? Did it ever occur to any one that a child so born was considered by this Government as born within the jurisdiction of Great Britain and a subject of the Queen?

The Courts of Great Britain have never so held. An application was made in the case of *In re Bourgoise*, 41 Ch. Div., 310, for the appointment of a guardian of two infant children. It appeared that the father of the children, a Frenchman, had been naturalized in England and was there married to an Englishwoman. He afterwards returned to France, and the children in question were born there. The application was denied for the reason that, among other things, the petitioners were French subjects by the mere fact of their birth. Lord Justice COTTON said, at page 319 :

"They were the children of an Englishwoman who married a Frenchman who obtained naturalization here; but they were born abroad, and *prima facie*, according to the laws of England, and I suppose according to the law of all civilized countries, that makes them subjects of the French State. If they had been born in England they would, without any act of Parliament, have been subjects of the English Crown."

It has been held by this Court in *Yick Wo vs. Hopkins*, 118 U. S., 356, that the Chinese race is within the protection of the Fourteenth Amendment to the Constitution, and that Chinamen are entitled to the equal protection of the laws of every State. If one portion of this Fourteenth Amendment includes within its scope and meaning the Chinese race, it is not clear why the same people do not come within the terms of another portion of the same amendment.

The father of Wong Kim Ark had an unquestionable right to the protection of the laws of this country as against the citizens or other inhabitants thereof, but, further than that, he had a right to invoke the aid of this nation against the Emperor of China, whose subject he was by birth. This is the doctrine of this Court, which has said :

"By the law of nations, doubtless, aliens residing in a country with the intention of making it a permanent place of abode acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations" (*Chinese Cases*, 149 U. S., 698-724).

In return for this protection the father of Wong Kim Ark owed allegiance to the United States—that is to say, he owed obedience to them, and the only obedience possible in a republic is obedience to its laws.

The father of the appellee being subject to the jurisdiction of the United States in the sense that he could invoke their protection against the country of his origin and owed obedience to their laws, it is not clear what further could be meant by these words, and it would seem that Wong Kim Ark's father was, while in the United States, subject to their jurisdiction.

In *Radich vs. Hutchins*, 95 U. S., 210, the plaintiff was an alien resident in the Southern States at the time of the war and a subject of the Emperor of Russia. He brought an action to recover certain money and property which had been paid by him to the Confederate Government for the privilege of exporting certain cotton. The defendant demurred, and the demurrer was sustained. Upon appeal to this Court the judgment below was affirmed upon the ground that the transaction was "fatally tainted," inasmuch as the plaintiff had assisted the Southern States "in their war against the Government and authority of the United States." Upon the question of the allegiance of a resident alien, the Court said at page 211 :

"If at the time the transaction took place which has given rise to the present action the plaintiff was a subject of the Emperor of Russia, as he alleges, that fact cannot affect the decision of the case, or any question presented for our consideration. He was then a resident of the State of Texas, and engaged in business there. As a foreigner domiciled in the country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States."

In *Carlisle vs. United States*, 16 Wall., 147, it was decided that British subjects resident in the Southern States during the War of the Rebellion owed allegiance to the United States and were subject to prosecution for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion. This Court, in its opinion, discusses at length what is meant by "allegiance," and says at page 154 :

"The claimants were residents in the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. 'The rights of sovereignty,' says Wildman in his *Institutes on International Law*, 'extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection.'

"By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a

citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

“ This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said : ‘ Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.’ And again : ‘ Independently of a residence with intention to continue such residence ; independently of any domiciliation ; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.’ ”

In Hall's International Law, page 204, is the following :

" During the civil war in the United States the British Government showed itself willing that foreign countries should assume to themselves a very liberal measure of rights in this direction over its subjects. Lord Lyons was instructed ' that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishments ' ; and, though objection was afterwards taken to English subjects being compelled ' to serve in the armies in a civil war, where, besides the ordinary incidents of battle, they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern, ' it was at the same time said that the Government ' might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the Militia or National Guard or local police, for the maintenance of internal peace and order, or even, to a limited extent, for the defense of the territory from foreign invasion. ' "

Whether Wong Kim Ark was himself at the time of his birth subject to the jurisdiction of the United States does not depend upon whether his father was or not, but we take it that it is of some importance in this case that the father of Wong Kim Ark was, at the time his son was born, subject to the jurisdiction of the United



States within any plain construction of these words, and under the authorities cited could have been tried for treason or drafted into the armies of the United States to defend the country from a foreign invasion. He certainly was not a member of any nation which was within the limits of the United States, and he was not subject to any other political jurisdiction.

This Government has recognized the Indian tribes as independent political communities, because they were the original inhabitants of the country, but it has never extended this doctrine so far as to say that a foreign country may establish within our borders an independent political community. If the doctrine advanced by the Solicitor-General should prevail, then we should have independent Chinese, English and German kingdoms within our boundaries, and the children born in these communities would remain English, German or Chinese subjects, incapable even of naturalization, as our law stands to-day. The Monroe Doctrine has received the most vigorous support of this Government since it was first advanced, but would seem to be entirely nullified by the doctrine the Solicitor-General now asks this Court to declare to be the law of the United States. If independent political communities can be established by foreign nations within our own country itself, it would hardly seem worth while to pay attention to the establishment of any such community in South or Central America.

We think the counsel for the Government have been misled by the decision of the Court in *Elk vs. Wilkins*, 112 U. S., where it was said that the words "subject to the jurisdiction" of the United States meant "subject to the political jurisdiction thereof." All that was then intended was that the Indians were independent nations, and that any tribe of Indians was as distinct a political community as England, and that the political jurisdiction over the Indians, so long as they held to their tribal relation, was in their own nation, just as

England had jurisdiction over the people of Great Britain. They were considered a nation within a nation. It can hardly, however, be seriously argued that each unnaturalized Englishman, Scotchman or Frenchman in this country is, while he remains here, within the political jurisdiction of England or France.

Political jurisdiction of a nation is exercised within its own boundaries, and is not tolerated within the dominions of another country. Each nation must take care of the people who live in it, and cannot for a moment recognize the right of another nation to exercise a political jurisdiction within its limits. The position of the Indians is special, and the reasons for it have been previously stated.

Putting aside the question of whether the father of Wong Kim Ark was "subject to the jurisdiction" of the United States while he resided here, we then come to the independent consideration of the status of the appellee himself. His father may or may not have been subject to the jurisdiction of this country, although we think we have shown that he was, but the question of the citizenship of Wong Kim Ark rests on an entirely different basis. A man cannot inherit his citizenship from his father as he does his property. It is something between himself and the country of his birth, and in no way connected with the relations of the family as distinct from the State. As Mr. Bates, then Attorney-General, said in 10 Opin. of Atty.-Gen., 382, 399: "It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law."

In *McKay vs. Campbell*, 2 Sawy., 118, the syllabus is as follows:

"By the common law a child born within the allegiance of the United States is born a subject

thereof, without reference to the political status or condition of its parents."

It is admitted that Wong Kim Ark was born in the United States, and has lived here ever since. The only question is whether he comes within the second condition of perfect citizenship required by the Fourteenth Amendment, and was "subject to the jurisdiction" of the United States at his birth.

As was said in *Jones vs. McMasters*, 20 How., 8, 20, *mutatis mutandis* (the italicised words alone are our own):

"The *appellee* was born under the dominion of the *American Republic*, and has lived under it ever since *his* birth, and beyond all question, therefore, is a citizen of that Government owing it allegiance, which has never been interrupted or changed."

At the time of his birth Wong Kim Ark was entitled to the protection of the United States, and in return owed to them allegiance. The difficulty is perhaps with the meaning of the word "allegiance," but it is certainly not easy in a Republic to give it any other meaning than obedience to the laws of the Republic, which are the expressed will of the people, who are the sovereign.

"The term 'citizen' as understood in our law is precisely analagous to the term subject in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people, and he who before was a 'subject of the King' is now 'a citizen of the State'" (*State vs. Manuel*, 3 Dev. & Battle's N. C. R., 26).

This Court has said that "By allegiance is meant

the obligation of fidelity and obedience which the individual owes to the Government under which he lives, or to his sovereign in return for the protection he receives" (Carlisle vs. United States, 16 Wall., 147, 154). In the case of *Minor vs. Happersett*, 21 Wall., 162, 166, Chief-Justice WAITE in speaking of allegiance, said: "Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." According to Mr. Justice STORY in *Englis vs. Trustees of the Sailor's Snug Harbor*, 3 Pet., 99, 155, "allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and *allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign.*"

If, then, a man is "subject to the jurisdiction" of the United States when he owes to them allegiance and is entitled to their protection, it would seem that both Wong Kim Ark and his father come within the requirement of the Fourteenth Amendment, and were, at the time of the former's birth, within the territory of the United States, "subject to the jurisdiction thereof."

It may be said that, under this construction of these words, they were unnecessary and there was no reason for their insertion in the Constitution. The other side may say that, if our argument is correct, it was sufficient to provide that any man born in the United States was a citizen thereof, as it follows that a man by the mere fact of his birth in this country owes the Government allegiance and is entitled to its protection, and is therefore "subject to its jurisdiction," as we interpret these words.

The purpose, however, of this clause was to except that class which had always been previously excepted from citizenship in a State by the mere fact of birth, viz.: the children of foreign ambassadors, who, under a fiction of law, were deemed the subjects of the country of their parents on the theory that "an Ambassa-

dor's house is reputed part of his Sovereign's realm," and the American Indians who, though born within the boundaries of our country, were deemed independent nations.

In the first section of the act of Congress approved March 26, 1790 (1 Stat. at Large, 103), it is enacted :

" That any alien being a free white person, who shall have resided within the limits and *under the jurisdiction of the United States* for the term of two years, may be admitted to become a citizen thereof."

We take it that no difference in meaning can be assigned to the clause "under the jurisdiction of the United States," found in the naturalization act, and the words of the Fourteenth Amendment, "subject to the jurisdiction thereof." The words are used in the same connection in both places. In each case they have reference to a condition precedent to citizenship. A man, to be entitled to become a citizen by naturalization, must have been "under the jurisdiction of the United States" for two years. Only those born within the territory of the United States, and "subject to the jurisdiction thereof," can be citizens under the Constitution by reason of their birth.

The applicant for a certificate of naturalization is considered to have been "under the jurisdiction of the United States" during his alienage because he owes to this country allegiance and obedience to its laws and is entitled to its protection. The purpose of the words was undoubtedly only to except foreigners in the diplomatic service, who were considered subjects of the countries they represented and not "under the jurisdiction of the United States."

If any other interpretation was put upon these words as used in the Naturalization Act and they were supposed to except the alien residents of this country upon the ground that such alien residents were not "under the

jurisdiction of the United States," it is not plain how there could ever have been any practical application of this law. These words are still found in the Revised Statutes relating to naturalization (U. S. Rev. Stat., § 2165).

It is a little difficult to see what distinction can be drawn between the two cases. If an alien who resides in the territory of this country is "under the jurisdiction of the United States" for the purposes of naturalization, it would seem to follow that a man born here and always residing here must be "subject to the jurisdiction thereof," and must have been so at his birth.

Setting aside the fact that the petitioner below is of Chinese extraction (for "we may suspect that race was the cause of the hostility, but it is not so averred." U. S. vs. Cruikshank, 92 U. S., 542, 556), and assuming that the appellee was the son of a German alien, who had never been naturalized (which assumption will in no way affect the legal question involved here), it would then be very clear that his father, after his long years of residence in this country, would be entitled to a certificate of naturalization and was "under the jurisdiction of the United States" within the meaning of the act. If, then, the father is "under the jurisdiction of the United States," what is it which prevents the son, with the added fact of birth in our territory, being "subject to the jurisdiction thereof?"

This exception of the children of foreign ambassadors and the kindred exception of the Indians were well known to the framers of this amendment, and it was a matter of common knowledge that the former, leaving out the question of slaves, was the only substantial exception to citizenship by reason of birth which was known to the common law. It is a matter of history that the Fourteenth Amendment, and the contemporaneous legislation known as the Civil Rights Bill, were, in the opinion of Congress at the time, but declaratory of the rule in regard to citizenship, as known to

the common law. It has also been so held by the courts.

Judge DEADY in *McKay vs. Campbell*, 2 Sawy., 118-130, said :

"It is not to be presumed that the amendment was made to the Constitution to change the rule of the common law, but rather to declare and enforce it uniformly throughout the United States and the several States."

In *Minor vs. Happersett*, 21 Wall., 162, 165, Chief-Justice WAITE, after saying that women were, without doubt, citizens of this country, and, after referring to the Fourteenth Amendment in support of his statement, says :

"But in our opinion it did not need this amendment to give them that position."

In the note on page 49 of Kent's Commentaries (14th Ed.), after giving the words of the Fourteenth Amendment, it is said :

"This seems to fix upon us the doctrine stated in the text, and derived from the principle of the common law, that all persons born within the dominions of the Crown, with hardly an exception, are to all intents and purposes British subjects."

Any debate of Congress on the Civil Rights Bill contains frequent statements that the bill is but declaratory of the common law as it already existed.

The Civil Rights Bill was approved April 9th, 1866 (14 U. S. Stat. at Large, 27), and was passed two years prior to the adoption of the Fourteenth Amendment to the Constitution. The words used therein relating to the question of citizenship are similar to those we are now seeking to define. They are as follows :

"All persons born in the United States and not subject to any foreign power \* \* \* are hereby declared to be citizens of the United States."

We do not see what substantial distinction can be drawn between the words of the Civil Rights Bill and the clause of the Fourteenth Amendment. In the one case the condition of citizenship is birth "not subject to any foreign power," and in the other it is birth "subject to the jurisdiction" of the United States.

The Civil Rights Bill was vetoed by President Johnson, and his interpretation of these words perhaps goes as far to show what they were supposed to mean at the time they were used as any other. It was very clear to him that a man in the position of Wong Kim Ark was not subject to the jurisdiction of any foreign power, and was subject to the jurisdiction of the United States, for he says in his veto message (Congr. Globe, 39th Congress, p. 1679):

"By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. *This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes and persons of African blood. Every individual of those races born in the United States is, by the bill, made a citizen of the United States.*"

In *United States vs. Rhodes*, 1 Abb. U. S. Rep., 28, the constitutionality of the Civil Rights Bill came up for decision in a Federal Court, apparently, for the first time. Mr. Justice SWAYNE in his opinion said at pages 38, 40 and 41:



"The act of Congress confers citizenship. Who are citizens, and what are their rights? The Constitution uses the words 'citizen' and 'natural-born citizens'; but neither that instrument nor any act of Congress has attempted to define their meaning. \* \* \* All persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves in legal contemplation are property, and not persons. \* \* \*

" 'Citizens under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress.'

" *We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.*"

As Lord COCKBURN says in his book on Nationality, page 7 :

"By the common law of England every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject, save only the children of foreign Ambassadors (who were ex-

cepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England."

At page 12 of the same work is the following statement :

" The law of the United States of America agrees with our own. The law of England as to the effect of place of birth in the matter of nationality became the law of America as part of the law of the mother country, which the original settlers carried with them."

If at common law every person born in a country was a citizen thereof with the single exception of the children of foreign ambassadors, and if the Fourteenth Amendment is but declaratory of the common law, it is difficult to see how any other exception than that found in the common law, was intended by the words " subject to the jurisdiction."

The case of *Elk vs. Wilkins*, 112 U. S., 94, does not, under any true interpretation, extend the meaning of these words. The argument, in the mind of the Court, was simply that children of ambassadors were excepted from the class of citizens by right of birth within the limits of the United States, because, by a fiction, they were deemed subjects of another country, and that likewise the Indians, though born within our geographical boundaries, were by reason of a peculiar environment subjects of another nation within our own, as we ourselves had considered and treated them for years.

We now come to the construction of this amendment by the lower Courts, and the most important case is that of *In re Look Tin Sing*, 10 Sawy., 353, decided by Mr. Justice FIELD. The same question was presented in this case in precisely the same way in which it arises here, and it was then held that a

Chingaman born in the United States of parents not engaged in any diplomatic capacity was a citizen thereof. The opinion of Mr. Justice FIELD was concurred in by Judges SAWYER, SABIN and HOFFMAN. At page 359 the Court said :

“ The jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.”

This is the idea which we have before sought to convey, viz. : that this country could not permit another nation to claim jurisdiction of a man born here. It is, perhaps, conceivable that this Government might in the future by some law permit the individual himself to elect, when of age, what nation he chose for his country, but it is out of the question for our Government to allow another government to say to what country a person born within our territory belongs. That is a national and not an international question, and no nation that we know of has gone so far as to suffer the persons born and still residing in its territory to be claimed by a foreign nation as its citizens. A man born in the United States is, therefore, a citizen of the United States (in the absence of any statute permitting him to elect what country he shall call his own) “ unless perchance he should be a citizen of the world. The latter is a creature of the imagination and far too refined for any republic of ancient or modern times ” (Talbot vs. Janson, 3 Dallas, 133, 153).

The United States, as well as every other nation, have long recognized the doctrine that they have no jurisdiction outside of their own boundaries, and that a person born in a foreign country is born outside of their jurisdiction and within the jurisdiction of the country of birth. In Section 1993 of the Revised Statutes it is enacted that “ all children heretofore born or hereafter born out of the limits and jurisdiction of

*the United States*, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States." By this section it is understood that all children of citizens born in foreign countries shall be deemed, so far as this country is concerned, citizens thereof, but by its express words it is stated that such persons are born *out of its jurisdiction*. If a person born of our citizens in the territory of a foreign power is born out of our jurisdiction, it is not plain why a person born within our limits of foreign citizens is not born out of the jurisdiction of the country of his parents. If born out of the jurisdiction of every country than the United States, then he must have been born "subject to the jurisdiction" of the United States.

The argument that, if the United States have passed a law declaring that children of our citizens born in foreign countries are citizens of the United States, they should then pass a law providing that children of foreigners born in this country are citizens of the country of their parents, can, of course, not be considered by this Court. The question here is what the people of the United States have done, and not what they might or ought to do; and no one doubts the right of this nation to so legislate, if its people should see fit, but so far it has not done so.

In the case of *ex parte Chin King*, 13 Sawy., 333, it was again held by Judge DEADY "that a child born in the United States of Chinese parents is, by the rule of the common law and the Fourteenth Amendment, a citizen of the United States" (syllabus).

Judge DEADY made a similar decision in the case of *Yung Sing Hee*, 36 Fed. Rep., 437, 438, saying that the petitioner "was born within or subject to the jurisdiction of the United States, and is, therefore, a citizen thereof."

The Circuit Court of Appeals for the Ninth Circuit in *Gee Fook Sing vs. United States*, 49 Fed. Rep., 146,

came to the same conclusion, Judge HANFORD writing the opinion.

Perhaps the latest case on this subject is *Benny vs. O'Brien*, 32 Atlantic Reporter, 696. The question before the Supreme Court of New Jersey was "whether a person born in this country of alien parents who, prior to his birth, had their domicile here, is a citizen of the United States," and in a very well considered opinion it was held that he was, the Court saying, at page 697:

"Two facts must concur—the person must be born here, and he must be subject to the jurisdiction of the United States according to the Fourteenth Amendment, which means, according to the Civil Rights Act, that the person born here is not subject to any foreign power. Allan Benny, whose parents were domiciled here at the time of his birth, is subject to the jurisdiction of the United States, and is not subject to any foreign power. \* \* \* Therefore Allan Benny is a citizen of the United States in virtue of his birth here of alien parents, who, at the time of his birth, were domiciled in this country."

In *Fong Yue Ting vs. The United States*, 149 U. S., 698, 716, this Court apparently approved of the right of citizenship by reason of birth in the United States, for it said:

"Chinese persons *not born in this country* have never been recognized as citizens of the United States."

In *Comitis vs. Parkerson*, 56 Fed. Rep., 556, the Court decided that a native-born woman, by her marriage to an unnaturalized alien resident, did not cease to be a citizen of the United States. In speaking of the position of her husband in this country, Judge BILLINGS said (p. 563):

"By virtue of his settlement and residence here the Constitution makes his children citizens of the United States."

The Solicitor-General has referred to a decision by Secretary Bayard in the Greisser case (2 Whart. Int. Dig., 399), in which it appeared that Richard Greisser, an applicant for a passport, was born in Ohio in 1867, of a German subject domiciled in Germany. He was taken from the United States by his parents when two years old and had always lived in Germany or Switzerland. The passport was denied to him, and Secretary Bayard said :

"The son [the applicant], therefore, *so far as concerns his international relations*, was at the time of his birth of the same nationality as his father. Had he remained in this country till he was of full age and then elected an American nationality, he would, on the same general principles of international law, be now clothed with American nationality."

This is rather a dangerous authority for the Government to rely on here, as under it Wong Kim Ark would be held to be a citizen of the United States, he having remained here until twenty-one and having elected an American nationality. But, aside from that aspect of the Greisser case, Mr. Bayard first considered the question before him entirely from an international point of view. He then said "that the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation," and inquired as to how far the international rule had been affected by the legislation of the United States. He referred to Section 1992 of the Revised Statutes (Civil Rights Bill) and the Fourteenth Amendment of the Constitution, and without one word of reasoning or the citation of a single authority said that Richard Greisser "was on his birth

‘subject to a foreign power,’ and ‘not subject to the jurisdiction of the United States.’ ”

Just why and in what way Greisser was subject to a foreign power Mr. Bayard does not tell us. Was he not still looking at the question from the standpoint of the law of nations? Had he freed himself from the view, which many nations have adopted as in their opinion the most liberal, that the nationality of a child is to be determined by the nationality of his father, and not by the place of his birth. It is not plain how Greisser, when born, was in any true sense not “subject to the jurisdiction of the United States.” If the German Government had sent its officers to Ohio to bring the father of Greisser, or Greisser himself, back to Germany, and compel him to join the German army, would it have been permitted? Would they not both, father and son, immediately upon their seizure, have been released by our courts upon a writ of *habeas corpus*? Would not both have been held to have been within the safeguards of the Constitution and entitled to the protection of the laws of this country (Chinese Cases, 149 U. S., 698, 716, 724)? Internationally, and perhaps theoretically speaking, Greisser and his father may have been “subject to a foreign power,” but locally and practically they were subject to the jurisdiction of the United States.

Whenever international law conflicts with the local law of a particular country, “the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation” (Secretary Bayard, *supra*). This principle our government would be the first to adopt should any foreign country send its emissaries to our shores for the purpose of compelling those of its subjects who had emigrated to the United States and had not become naturalized or their children born on our soil, to return to the country of their origin. Even enmity to the Chinese race would not permit the creation of any such dangerous precedent.

If this case should be decided in favor of the Government, and it should be held that children born in this country to an alien resident are not "subject to the jurisdiction of the United States" and are "subject to a foreign power," what reply can the Secretary of State make to the Government of Russia or Germany or England in the case suggested? Must he say:

I admit that the highest tribunal of my country has decided that the men you are taking away by force to join your armies are not 'subject to the jurisdiction' of my government, and are subject to the jurisdiction of yours, but that decision does not mean that they are subject to the jurisdiction of your government in the sense that obedience can be compelled to that government and its laws, or that they are 'not subject to the jurisdiction' of my government in the sense that the protection of the Constitution and the laws of this country is withheld from them, and these men, born in this country of subjects of your government, who have been seized by your officers, must be released or the friendly relations between our two governments must cease.

Before the United States is forced to take this position, it would seem wise for the Solicitor-General not to attach too great importance to a hastily considered letter of Secretary Bayard, as it would appear that he arrived at the decision expressed by him because of his confounding the question he was then deciding with the question in its supposed international aspect, which was the subject of the first part of his letter to Mr. Winchester, the then Minister to Switzerland.

Further than that the construction put on these words of the Fourteenth Amendment by Mr. Bayard were in no way required by the case before him. It was a mere *obiter dictum*. The question raised by the facts presented to Secretary Bayard was simply whether a United States passport should be given to Greisser to enable him to travel from one European country to another under the care and protection of this Government.



It was strictly an international question and to be considered solely in that aspect.

The question was before the Hon. E. R. HOAR when Attorney-General, as to whether the children born abroad, and there residing, of citizens of the United States, were entitled to passports. He was clearly of opinion that, under our statutes, those who had applied for passports were citizens of the United States, but he seemed to doubt the propriety of this Government issuing passports to them. He said, in 13 Opin., A. G., 89, 91 :

“ I understand a passport to be a certificate of citizenship. \* \* \* But while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its Government, I do not think that it is competent to the United States by any legislation to interfere with that relation, or by undertaking to extend to them the rights of citizens of this country to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be that a person ‘ born in a

strange country under the obedience of a strange prince or country is an alien' \* \* \* if the applicants can receive any passport from your department it would seem that it must be a qualified one, which should state that, although they were citizens of the United States, they were only so in the qualified sense which I have indicated."

Greisser, under international law, being a citizen of Germany or of Switzerland at the time he applied for his passport just as much as a citizen of the United States, there was no reason why he should not have obtained a passport from the country where he lived. In other words, Mr. Bayard might have placed his rather lengthy decision upon the brief grounds stated by his predecessor, Mr. Evarts, when he wrote : " A child who, born in the United States to French parents, goes in his minority to France, and there remains voluntarily after he has become of full age, *may be held to have abjured his American nationality*" (2 Whart. Int. Dig., 396). That is to say, the Greisser case is not the case at bar, and the construction of the amendment of the Constitution was not requisite for its decision. Greisser at the time of his birth was a citizen of this country, but had abjured his nationality, and at the time he asked for a passport he had ceased to be a person born in the United States and subject to the jurisdiction thereof as he was at his birth, but was a person born in the United States and since become subject to a foreign power. He had expatriated himself, and was not entitled to a passport.

There is no expression of opinion, except the letter of Secretary Bayard in the Greisser case, which is contrary to the decisions cited, and we therefore have an unquestioned judicial interpretation of the Constitution acquiesced in for years. The only reason given by the counsel for the Government for now desiring to change this construction is that by international law or

Roman law, or some other law than the law of the United States, the petitioner would not be considered a citizen thereof. It is important to notice that the counsel for the Government does not claim that under international law or Roman law the appellee would not be "subject to the jurisdiction" of the United States, but simply that he would not be a citizen thereof.

The true question is whether Wong Kim Ark at the time of his birth was "subject to the jurisdiction" of this Government. If he was, it follows that he was a citizen of the United States by virtue of the Fourteenth Amendment, without regard to what constitutes a citizen under the rules of international law or any other law.

The argument of the Government and of the *amicus curiæ* is interesting but theoretical. Its tendency is to draw us away from the real question, whether a State should not determine by its own law alone who are its citizens, or, as Attorney-General Bates says in 10 Opin. of Atty-Gen., 382, 390 :

"The discussion of this great subject of national citizenship has been much embarrassed and obscured by the fact that it is beset with artificial difficulties extrinsic to its nature.  
\* \* \* And these difficulties, it seems to me, flow mainly from \* \* \* the common habit of many of our best and most learned men \* \* \* of testing the political status and governmental relation of our people by standards drawn from the laws and history of ancient Greece and Rome, without, as I think, taking sufficient account of the organic differences between their governments and ours."

The question who is a citizen of a country is essentially a practical one, to be approached from a practical point of view ; but counsel for the Government seem to

have forgotten the principles declared by the Court in *State vs. Manuel*, 4 Dev. & Battle's N. C. Rep., 20, 29, in deciding who was a citizen of North Carolina, when it said :

"Constitutions are not themes proposed for ingenious speculation; but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed, shall think proper to change them."

The only question in the present case is as to the construction of the Constitution of the United States. This Court is asked to define the meaning of the words "subject to the jurisdiction" of the United States. It has not been clearly pointed out by counsel for the Government how International Law can control a question of national law, nor why this Court should resort to the law of nations to assist it in interpreting the law of its own country.

It is clear that a nation must have some rule by which to determine who are its citizens. Our argument is that the United States when it adopted the Fourteenth Amendment declared in favor of the simple doctrine that birth within the dominions of a country conferred the right of citizenship therein and intended only to formulate the law as it was then understood in the United States.

The argument of the Solicitor General is that this government, through the Fourteenth Amendment, intended to introduce the more modern and complicated principle of so-called international law (modern at least in the sense that it was never thought of until after the United States had declared their independence), that a child inherited the nationality of his parents, wherever he might be born, and so creating a race of people who, though born and reared

in this country, were to be deemed subjects of a foreign State, and who could not be naturalized under our law, as birth in a foreign country seems necessary to enable a person to take advantage of our Naturalization Act.

The question presented here would seem to be whether the people of the United States, by their adoption of the Fourteenth Amendment to the Constitution, intended to make that a written law which was already the unwritten law of their country, and with which they were familiar, or purposed to introduce the Roman law or the so-called Law of Nations, or more accurately speaking the statute law of some one of the countries of Europe, of which they as a body knew nothing whatever, and which was in seeming conflict with the naturalization acts already on their statute books.

We have not here to decide which is the better doctrine or whether the elective system of the Continental countries of Europe is more in accord with the progress of nations. We do not dispute the right of the people of the United States to amend the Constitution by declaring that "all persons born in the United States of alien parents, who have not been naturalized, shall be deemed citizens and subjects of the country from which their parents came, with the right when of age to become naturalized citizens of the United States." We do not undertake to say that such an amendment would or would not be an improvement upon the Constitution, as we say it stands to-day.

In the case of *Tape vs. Hurley*, 66 Cal., 473, the question was as to the right of a Chinese girl, who was born and had always lived in the City and County of San Francisco, to admission in the public school of the district in which she resided. The Code of California provided that: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age re-

siding in the district." The Court held that she was entitled to attend the school in question, and said (p. 474):

"As the Legislature has not denied to the children of any race or nationality the right to enter our public schools, the question whether it might have done so does not arise in this case."

So in the case at bar, the people of the United States have not denied to the children born in this country of alien parents the right of citizenship therein, nor have they passed any law declaring them to be the citizens or subjects of the country of their parents, and the question whether they might have done so does not arise in this case.

Our position is that any such discussion is foreign to the issue here, which is what is meant by the words "subject to the jurisdiction thereof," and we respectfully submit that the people of this country intended that these words should be construed in accordance with the principles of law of which they and their fathers before them had knowledge, and not in accordance with the Roman law or the law of any European country with which they were unfamiliar. In other words, they intended that the status of citizenship in the United States should be determined in accordance with the law of the United States and not upon the principles of the Roman law.

## POINT II.

### **Wong Kim Ark is under the common law a citizen of the United States.**

The Fourteenth Amendment is conceded to be simply an enactment of the law as it was then understood to exist in this country. It must, therefore, be assumed that, by the common law, birth "subject to the jurisdiction" of the United States, was the condition of citizenship therein, and it is necessary to examine the decisions prior to the adoption of the Fourteenth Amendment to ascertain what was considered under the common law a sufficient subjection to the jurisdiction of the United States to make a man a citizen thereof, and we, perhaps, cannot find a better statement of the rule than that of Mr. Justice STORY, when he said, in *Inglis vs. Sailors' Snug Harbor*, 3 Pet., 99, 164: "*Nothing is better settled at the common law than the doctrine that the children even of aliens born in the country, while the parents are resident there, under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.*"

The great case of *Lynch vs. Clarke*, 1 Sand. Ch., 583, was decided in 1844, and has since remained the leading authority upon the question. The case was twice argued and the briefs of counsel are printed in full in the report of the case. They are exhaustive of the subject and very able. The decision itself is remarkable and shows a complete comprehension of the question, coupled with long and patient research.

The bill in the cause was filed by one Bernard Lynch for the purpose of obtaining a declaration that one Clarke was seized of the celebrated Congress Springs in trust for Thomas Lynch, of New York City, then deceased, and that the plaintiff was entitled to all the equitable interests which Thomas Lynch had in the property. Clarke and Thomas Lynch had been part-

ners, and obtained control of the land at Saratoga in the course of their partnership dealings. Julia Lynch was made a defendant in the suit. She was born in the City of New York in 1819. Her father was Patrick -Lynch, a brother of Thomas Lynch, the partner of Clarke. Patrick Lynch was a British subject, who came to this country to live in 1815. He was never naturalized and left this country in 1819, soon after his daughter Julia was born, taking her with him. Patrick Lynch never returned to this country except on a temporary visit without his family, when he remained six months. Julia Lynch did not return to the United States until 1834, after the death of her uncle, Thomas Lynch, who was the partner of Clarke.

In her answer the defendant Julia Lynch insisted that she was a native-born citizen of the United States, and, as such, inherited all the real estate of which Thomas Lynch was seized.

In the Lynch case, therefore, the identical question was argued and decided which is presented here, viz.: Is the child born in the United States to an alien resident a citizen thereof?

The only difference between the two cases is that the appellee in the present case has always lived in the United States, whereas Julia Lynch was taken out of the country when still an infant in arms and did not return until she was fifteen years old.

It was urged in behalf of the complainant Lynch, as it is argued here, that there was no common law in the United States. The Chancellor fully and carefully considered the question from this point of view. He quoted with approval from the speech of Mr. Bayard in the House of Representatives in 1802, in which he said: "The Judges of the United States have held generally that the Constitution of the United States was predicated upon an existing common law. \* \* \* The Constitution is unintelligible without reference to the common law. \* \* \* Without this law the



Constitution becomes a dead letter" (p. 654), and expressed himself in the following language at page 652 :

"The Constitution of the United States, like those of all the original States, \* \* \* presupposed the existence and authority of the common law. The principles of that law were the basis of our institutions. In adopting the State and national Constitutions \* \* \* our ancestors rejected so much of the common law as was then inapplicable to their situation, and prescribed new rules for their regulation and government. But in so doing, they did not reject the body of the common law. They founded their respective State Constitutions and the great national compact upon its existing principles, so far as they were consistent and harmonious with the provisions of those Constitutions."

After a most careful analysis of all the authorities on the subject, it was decided that Julia Lynch was a native-born citizen of the United States, and the Chancellor said at page 663 :

"Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural-born citizen."

In the case of *State vs. Manuel*, 4 Devereux & Battle's N. C. R., 20, the defendant was convicted of an assault and battery, and was sentenced to pay a fine of twenty dollars, and, it appearing to the Court that he was a free person of color and unable to pay the fine, it was ordered that the Sheriff should hire out the defendant to any person who would pay the said fine for his services for the shortest space of time. From this

judgment the defendant appealed upon the ground that the act under which he had been sentenced was in conflict with the Constitution of North Carolina.

Upon the argument of the appeal the Attorney-General insisted that it was not necessary to examine any constitutional question, for the reason that the defendant could not claim the benefit of the Constitution because he was "*not a citizen of North Carolina.*"

The Court did not agree with the Attorney-General, and expressly decided that a free person of color if *born in North Carolina* was a citizen of North Carolina. The judgment was affirmed for the reason that the Court did not think that the law under which the defendant had been sentenced was in conflict with the Constitution of the State, but upon the question which is of interest in the case at bar the views of the Court were very strong and it was held that citizenship was conferred on free persons by birth, irrespective of any other fact.

"Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their colors or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity—or disqualification of slavery was removed—they became persons, *and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king.* Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free

and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, continued aliens. Slaves manumitted here become freemen, *and therefore if born within North Carolina are citizens of North Carolina, and all free persons born within the State are born citizens of the State*" (p. 24).

The opinion in *State vs. Manuel* was written by Judge GASTON, whom Mr. Justice SWAYNE called "one of the most able and learned Judges this country has produced" (*United States vs. Rhodes*, 1 Abb. U. S. Rep., 28, 42). The Supreme Court of North Carolina, in the subsequent case of *State vs. Newsom*, 5 Ired., 250, 253, referred to *State vs. Manuel* in these words: "That case underwent a very laborious investigation both by the bar and the bench. \* \* \* The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence and authority on all questions of a similar character."

In the case of the *United States vs. Douglas*, 17 Fed. Rep., 634, an information was filed against the master of the British bark "Eme" for bringing and landing within the port of Boston one Ah Shong, alleged to be a Chinese laborer, contrary to the Act of Congress of May 6, 1882, which made it a misdemeanor for the master of any vessel to "knowingly bring within the United States on such vessel, and to land or permit to be landed any Chinese laborer from any foreign port or place."

It appeared that Ah Shong had never been a subject or lived in the dominions of the Emperor of China, but that he had been born of Chinese parentage in the Island of Hong Kong after its cession by China to Great Britain in 1842, and that he was and had been from his birth a subject of the Queen of Great Britain.

The Circuit Court for the District of Massachusetts held that the Chinese Exclusion Acts only related to subjects of the Government of China, and that, therefore, Ah Shong, *being a British subject by reason of his birth in the territory of Great Britain*, was not within the purview of the Act of Congress which excluded Chinese laborers from the United States.

In the subsequent case of *In re Ah Lung*, 18 Fed. Rep., 28, it was held by Mr. Justice FIELD that the Chinese Exclusion Act did apply to a Chinaman who was a British subject by reason of his birth in the Island of Hong Kong after its cession to Great Britain. There is, however, no suggestion in his opinion that Ah Lung was not, at the time of his application for permission to enter the United States, a British subject; and the ground of the decision is that the language of the Exclusion Act was "sufficiently broad and comprehensive to embrace all Chinese laborers without regard to the country of which they may be subjects" (p. 32).

These two cases are of great interest in that they deal with the subject from an impersonal point of view and as it applies to another country. It is seemingly decided as a question upon which there can be no doubt that a man born in English territory of Chinese descent is a British subject. If a child born of Chinese parents in English territory is a British subject, it would seem that a child born of Chinese parents on the soil of the United States was an American citizen. That is to say, it is assumed in the cases just referred to that, under the common law, birth within the dominions of a nation confers citizenship therein, and that a man so born is subject to its jurisdiction.

In the case of *Lyndon vs. Danville*, 28 Vt., 809, the question was as to the proper settlement of a pauper. The facts were as follows: One Ralph Chamberlin, the father of the pauper, was born in Danville, Vermont, in 1800, and had a legal settlement in that town. He married in 1822, and thereafter moved to Stanstead, in the province of Canada East, and there remained until his

death in 1844. The pauper was born in Stanstead in 1826, and, when five or six years old, was brought to Lyndon, Vermont, by his mother. The pauper lived most of his life in Lyndon, and was removed in 1853 to Danville, on the ground that he was a proper charge upon the latter town, as having a derivative settlement there from his father and grandfather. The County Court held that the pauper had a legal settlement in the town of Danville. To this ruling the said town excepted and the exception was sustained upon the ground that the pauper, by reason of his birth in Canada, was an alien and could, therefore, derive no settlement from his father. The Court said at p. 816 :

“ The pauper, during his life, could be regarded only as an alien, and subject to all the incapacities of one. He was under no natural allegiance to this country, and the correlative duty of protection was not due from this country to him, except such as is due to all aliens during the time they are within its jurisdiction. \* \* \* Judge SWIFT (2 Swift's Dig., 618), says that ‘ by the common law, the children of private citizens born abroad are aliens.’ Chancellor Kent has remarked (2 Kent's Com., 1) that ‘ that is the rule of the common law without any regard or reference to the political condition or allegiance of their parents, with the exception of ambassadors.’ \* \* \* Surely the pauper, in this case, must be regarded as an alien and a subject of the Province of Canada, without reference to the citizenship of his father.”

In *Albany vs. Derby*, 30 Vt., 718, the syllabus is as follows :

“ The offspring of a citizen of this State, born subsequent to April 14, 1802, in a foreign gov-

ernment to which their father had removed *animo manendi*, and who return with their father to the United States after they have become of age, are aliens."

In *Dupont vs. Pepper*, 1 Harp. Ch. (S. C.), 5, the Court said at page 11 :

" I come, then, to the conclusion, that by the common law, children born abroad could not inherit lands in England, even from their parents who were native subjects. *The character of a natural-born subject, anterior to any of the statutes, was incidental to birth alone.*"

This part of the decision of the South Carolina Court was not reversed by this Court when the case was brought here by writ of error under the title of *Shanks vs. Dupont*, 3 Pet., 248.

In *De Geer vs. Stone*, L. R., 22 Ch. Div., 243, it is said in the headnote :

" There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects forever.

" The rule that the children born abroad of ambassadors in the service of the Crown of England abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts."

The different Attorney-Generals of the United States seem to have been very clear in their opinion that birth in this country of alien residents conferred citizenship therein. Mr. Black in a letter to Mr. Cass (1859) 9 A.-G. Opin., 373, said :

“ A free white person born in this country, of foreign parents, is a citizen of the United States.”

Mr. Bates in writing to Mr. Seward (1862), 10 A.-G. Opin., 328 was of the same opinion :

“ A child born in the United States of alien parents, who have never been naturalized, is, by the fact of birth, a native-born citizen of the United States, entitled to all the rights and privileges of citizenship.”

Mr. Fish, when Secretary of State, made the same ruling in two cases which came before him and said (2 Whart. Int. Dig., 396) :

“ So far as concerns our own local law, a child born in the United States to a British subject is a citizen of the United States.”

And again

“ The minor child of a Spaniard, born in the United States and while in the United States, or in any other country than Spain, is a citizen of the United States.”

Chapter 120 of the Laws of New York of 1872 is, according to its title, “ An Act to authorize the descent of real estate to female *citizens* of the United States,” and the chief condition precedent to citizenship seems to have been considered by the New York Legislature to have been birth in the United States, for it is provided by this statute that “ real estate in this State now belonging to or hereafter coming or descending to *any woman born in the United States or who has been otherwise a citizen thereof.*”

At the time of the adoption of the Constitution it was the law, not only of England and her colonies, but of the Continental countries of Europe, that a child

born within the territory of any government was a citizen thereof. Whatever change there may be at the present time in the countries of Europe in this respect has been brought about since the United States became an independent nation, and is the result of the Code Napoleon, which adopted the principle of election, and permitted a person born in France of foreign parents to elect, when coming of age, either France or the country of his parents as his country.

The appreciation of the people of the United States at the time of the foundation of their government that the general doctrine of all countries was that a man became by birth alone a citizen of the country in which he was born is, we think, shown by the Act of Congress approved March 26th, 1790, which provided that

“the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens” (1 Stat. at Large, 103, 104).

Without doubt this act was passed to enable children of citizens of the United States, born in other countries, to inherit real estate in this country and to permit them, if they should ever come here, to enter into the rights and privileges of full citizenship without the delay of naturalization. It was passed not to take away the status of the children so far as the country was concerned in which they were born, but to change the rule in regard to their relations to this country as it was then and has always since been understood. Without this law children born abroad of citizens of the United States would come to this country with all the disabilities of aliens, and they would have been debarred at that time in nearly every State from inheriting real property.

The purpose of the act was not to change the relation of other governments to people born within their



dominions, but to change the status of those people to our own Government, from what it was understood to be in this country without such law. The same idea was in the mind of Mr. Justice IREDELL, when he said in *Talbot vs. Janson*, 3 Dallas, 133, 164 :

“ Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate Marquis de la Fayette, that that absolved him as a subject or citizen of his own country? It had only this effect, that whenever he came into this country and chose to reside here he was *ipso facto* to be deemed a citizen, without anything farther. The same consequence, I think, would follow in respect to rights of citizenship conferred by the French Republic upon some illustrious characters in our own and other countries.”

In the case of *Calais vs. Marshfield*, 30 Me., 511, 518, 520, Chief-Justice SHEPLEY said :

“ The laws of the United States determine what persons shall be regarded as citizens irrespective of such person's pleasure. Accordingly the Act of Congress before named [6 Stat. at Large, 79], has been considered as determining that persons were entitled to be regarded as citizens, who were born and had ever continued to reside without the limits of the United States, being the children of citizens; *and such persons might at the same time be the subjects owing allegiance to the government of the country in which they were born.* \* \* \*

“ Although the government of one country may grant to persons owing allegiance to that of another, the rights and privileges of citizenship, it is not intended to intimate, that the government making such grant would thereby and without their consent or change of domicile be-

come entitled to their allegiance in respect to any of their political duties or relations."

If it was already the law that children born in a country of alien parents took the nationality of their parents it is not plain how this statute served any useful purpose. The fact of its passage "affirms the deficiency of the common law" (Binney's Article in 2 Amer. Law Reg., 193, 203).

The naturalization laws were subsequently amended several times, but the provision above referred to was not in any way changed until the Act of Congress of April 14th, 1802, was passed, which repealed all then existing laws on the subject, and provided that "the children of persons who *now are or have been* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

It will be noticed that children born in foreign countries of American citizens, who were themselves born after the passage of this act, were not thereby made citizens of the United States. The act, in its terms, applied only to the children of those who then were or had been citizens of the United States.

This remained the state of the naturalization law upon this subject until the Act of Congress of 1855 (10 U. S. Stat. at Large, 604), which was incorporated in Section 1993 of the Revised Statutes and is the law to-day. This section provides that :

"All children heretofore born, or hereafter born, out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth, citizens thereof, or declared to be citizens of the United States."

The passage of the Act of 1855, has always been attributed to an article said to have been written by Horace Binney, and published in the second volume of

the "American Law Register," at page 193. This article is entitled "The Alienigenæ of the United States," and begins with these words :

"It does not, probably, occur to the American families who are visiting Europe in great numbers, and remaining there, frequently, for a year or more, that all their children born in a foreign country are Aliens, and when they return home will return under all the disabilities of aliens. Yet this is indisputably the case."

The Act of 1855, is nearly, if not exactly, in the identical words of the proposed legislation suggested by Mr. Binney in his article just referred to, and the people of this country evidently agreed with Mr. Binney that a person born in another country of citizens of the United States was an alien, unless relieved from such alienage by special legislation.

The discussion of this question by Mr. Binney is most exhaustive and interesting. It leaves nothing for further research prior to the time it was written and seems to show conclusively that without statute and under the common law people born in foreign countries of citizens of the United States were aliens. He says in part :

"The state of the law in the United States is easily deduced. The notion that there is any common law principle to naturalize the children born in foreign countries, of native born American father and mother, father or mother, must be discarded. There is not and never was any such common law principle. But the common law principle of allegiance, was the law of all the States at the time of the Revolution, and at the adoption of the Constitution ; and by that principle the citizens of the United States are, with the exception before mentioned, such only

as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States." The Alienigenæ of the United States (2 Amer. Law Reg., 193, 203).

We confess that we do not quite understand what is meant by the *amicus curiæ* when he says in his brief at page 27 :

"The repulsive absurdity of the monstrous doctrine of double allegiance is so forcibly apparent as to render wholly inexcusable any attempt at these times to invoke it."

We had always supposed that the doctrine of double allegiance was essentially an American doctrine, and that the dual relation of each citizen to the Federal and State Governments was the distinctive mark of the system of government in this country. No difficulty seems to have been apprehended by this Court from the fact that a man owed a double allegiance, and was a subject or citizen of two governments, for it is said in *United States vs. Cruikshank*, 92 U. S., 542-550 :

"The people of the United States, resident within any State, are subject to two governments—one State and the other national—but there need be no conflict between the two. The powers which one possesses, the other does not. They \* \* \* have separate jurisdictions. \* \* \* It may sometimes happen that a person is amenable to both jurisdictions for one and the same act. \* \* \* This does not, however, necessarily imply that the two governments possess powers in common or bring them into con-

flict with each other. *It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both.* The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

The supposed dilemma of a double allegiance would appear to be in no way obviated even if the people of the United States should pass such a law as the appellant advises and should enact that children born to alien residents might elect their nationality when of age. Prior to coming of age such persons would be either of no nationality or else of a double nationality. After the age of twenty-one, if they elected the nationality of their parents, they would then owe to the United States the allegiance resulting from residence here and the allegiance due to the country of their election. In other words, a man who lives in a foreign country always owes a double allegiance, and as a practical matter the allegiance due to the country of his residence is of primary importance. To adopt the words of Mr. Justice STORY, used by him in a somewhat different relation, he is "*bound ad utriusque fidem regis.* In an American Court we should be bound to consider him as an American citizen only ; in a British Court he would, upon the same principle, be held a British subject" (*Inglis vs. Sailors' Snug Harbor*, 3 Pet., 99, 161.)

The objection, therefore, of counsel for the Government that a double allegiance results from the law in the United States as it is at the present time, would seem also to apply to the doctrine which the appellant seeks to maintain and is obviously nothing but the re-

sult of a person taking up his residence in a foreign country. "Foreigners in a country are subject to two sovereignties" (Westlake on Int. Law, 126). If by a law of the United States Wong Kim Ark was declared to be a citizen or subject of the country of his parents, he would then owe an allegiance to the United States while he remained here, as well as to the country which had been forced upon him. If, on the other hand, when twenty-one, he had the privilege of election, and elected, as he has done, this country as his nationality, in conformity with the law of many European countries, which the appellant's counsel insists should be our law too, he would still be guilty of being an exponent of "the repulsive absurdity of the monstrous doctrine of double allegiance," for the Emperor of China would continue to consider him as his subject, as the counsel for the Government say the Emperor of China does now. He would then be under the so-called law of nations also a citizen of the United States, and we should still have this nightmare of a double allegiance.

In other words, there is nothing "monstrous" or "repulsive" or "absurd" in the doctrine of double allegiance, and it is the necessary consequence of residence in a foreign country.

The fears suggested at page 34 of the brief of the *amicus curie* that our next president might be a Chinaman is equally uncalled for. If a modern Confucius or a greater than Li Hung Chang should be born upon our soil, and the people of the United States should be of the opinion that he was the best person in this country for their president, it is not plain where, if he were elected, the disgrace would lie; but, if there were any, it would seem to fall, not on the Chinese race, but on the white citizens of the United States, who selected a Chinaman as the highest officer of their government.

The counsel for the appellant in their discussion of the principles of international law have forgotten that a man is called a "citizen" of the United States "to

designate by a title the person and the relation he bears to the nation," and that, when the word is so used, "it is understood as conveying the idea of membership of a nation and nothing more" (*Minor vs. Happersett*, 21 Wall., 162, 166), and that "Citizenship has no necessary connection with the franchise of voting, eligibility to office, or, indeed, with any other rights—civil or political. Women, minors and persons *non compos* are citizens, and none the less so on account of their disabilities" (*United States vs. Rhodes*, 1 Abb. U. S. Rep., 28, 43).

There would seem to be a remarkable unanimity of opinion in every quarter in which the question ever arose that a person born in this country of alien residents was a citizen thereof both at the common law and under the Fourteenth Amendment to the Constitution. This Court, the lower Federal Courts and the State Courts have been in accord on this subject without a single dissenting voice. The law officers of the general Government and the various Secretaries of State, with the possible exception of Mr. Bayard, have held the same view and the weight of authority at least appears to be in favor of the proposition that birth in the United States confers citizenship therein, so long as the parents of the child, irrespective of their nationality, are residents of this country.

The only argument advanced by the other side against this position is—(1st) that some European countries have adopted the principle of election and that the United States should do the same, which is a question for Congress to determine; (2d) that by so doing "the repulsive absurdity of the monstrous doctrine of double allegiance" would be done away with, which is not at all clear, and (3d) that if the judgment below was affirmed, a Chinaman might be President of the United States.

We respectfully submit to this Court the question which of these arguments should prevail, and we close our brief with the words of Charles Sumner :

" Here is the great charter of every human being, *drawing vital breath upon this soil*, whatever may be his condition and *whoever may be his parents*. He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian or Ethiopian race—he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black, nor is he French, German, English or Irish; he is *man*, the equal of all his fellowmen. He is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care" (Argument of Charles Sumner on Equality before the Law, quoted in 2 Story on the Constitution, 5th Ed., 1935).

### POINT III.

**Wong Kim Ark is a citizen of the United States, if the laws of European countries are to determine the question.**

As we have shown before, thirteen countries of Europe, including England and France, have adopted, in one form or another, as their law, that children born in their territory, of foreign parents residing therein, have the right of election, and can choose, when of age, if they see fit, the nationality of their parents or the nationality of the country of their birth.

By the agreed statement of facts, the appellee is shown to have been born here, to have lived here ever since his birth, and to have elected this country as his nationality. This would seem to dispose of the case in



favor of the appellee under the doctrine of the law of nations, as it is called by the appellant, or, more properly speaking, under the law of many of the countries of Europe, if it has any application whatever.

#### **POINT IV.**

**The judgment below discharging Wong Kim Ark from the custody of the Collector of Customs at the Port of San Francisco upon the ground that he was a citizen of the United States should be affirmed.**

MAXWELL EVARTS,  
Of Counsel for Appellee.

It is not a new thing to find a man  
who has been a member of the  
Society of Friends for many years  
and who has been a member of the  
Society of Friends for many years

and who has been a member of the  
Society of Friends for many years  
and who has been a member of the  
Society of Friends for many years  
and who has been a member of the  
Society of Friends for many years





IN THE  
**Supreme Court of the United States.**

**OCTOBER TERM, 1896.**

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*No. 449.*

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THE UNITED STATES, APPELLANT,

*vs.*

WONG KIM ARK, APPELLEE.

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*Appeal from the District Court of the United States for the  
Northern District of California.*

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**BRIEF FOR THE APPELLEE.**

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PRELIMINARY STATEMENT.

The question presented by the record is whether or not the appellee, Wong Kim Ark, is a natural-born citizen of the United States, under and by virtue of the first section of the Fourteenth Amendment of the Constitution, which ordains and declares:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property without due process of law."

The appellee was born in the city of San Francisco, in the year 1873, of parents who were Chinese subjects and persons of Chinese descent, but who, at the time of the birth of the appellee, were domiciled and engaged in business in San Francisco. (Statement of Facts, I, II, Record, p. 10.)

The petition for the writ of *habeas corpus* avers, and it is not denied, that the parents of the appellee came to this country prior to the year 1873, under the invitation contained in the "*Burlingame Treaty*," which was concluded, it will be remembered, on the 28th of July, 1868. (Petition, Rec., p. 6.)

The month of July, 1868, is a memorable one in the political history of this country.

It was on the 20th of July, 1868, that the Secretary of State issued his proclamation promulgating the Fourteenth Amendment as a part of the Constitution of the United States; and on the 27th of July, 1868, Congress passed the act "concerning the rights of American citizens in foreign States," which declared that "the right of expatriation is a natural and inherent right of ALL PEOPLE, indispensable to the enjoyment of life, liberty, and the pursuit of happiness, and in recognition of this principle this Government has freely received emigrants from all nations and invested them with the rights of citizenship," and providing that "any declaration, instruction, opinion, order, or decision of any officer of this Government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this Government." (Proclamation, July 20, 1868, 15 Stats., 706; act July 27, 1868, *Ib.*, p. 223.)

The United States and China, by the Treaty of 1868, recog-

nized "the inherent and inalienable RIGHT OF MAN to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other for purposes of curiosity, of trade, or as *permanent residents*."

By article 6 of the treaty it was declared that Chinese subjects "visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may be there enjoyed by the citizens or subjects of *the most favored nation*." (16 Stats., 739, 740.)

The stipulated facts show, as has been mentioned, that at the time of the birth of the appellee, in the year 1873, his parents "were *domiciled residents of the United States*, and had established and enjoyed a *permanent domicile and residence therein at the city of San Francisco*," and that they "continued to reside and remain in the United States until the year 1890, when they departed for China." (Rec., p. 10.)

The parents of the appellee, it is stated, "during all the time of their said residence in the United States, as domiciled residents therein, were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China." (Rec., p. 10.)

In the year 1890, the appellee "departed for China upon a temporary visit and with the intention of returning to the United States," and he "did return thereto on the 26th of July, 1890, on the Steamship *Gaelic*, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States." (Rec., p. 11.)

He remained here, claiming to be a citizen of the United States, until 1894, when he again went to China upon a temporary visit and with the intention of returning to the United States.

He returned to this country in the month of August, 1895.

when his application to be permitted to land at San Francisco was denied upon the sole ground that he was not a citizen of the United States. (*Ib.*)

Ever since his birth the appellee has had but ONE RESIDENCE, namely, a residence in the State of California; he has never changed or lost that residence or gained or acquired another residence, and he there resided, claiming to be a citizen of the United States. (Rec., p. 10.)

He has not, "*either by himself or his parents acting for him, ever renounced his allegiance to the United States.*" (Rec., p. 11.)

It is said in the brief of the Solicitor General that "it is not agreed as a fact that Wong Kim Ark was 21 years of age when he returned to the United States in August, 1895."

We do not so understand the record. It is expressly agreed that the appellee was born "*in the year 1873,*" and that he returned to the United States "*in the month of August, 1895.*" If he was born on the last day of the year 1873, he was, of course, over twenty-one years of age in the month of August, 1895.

The necessary conclusion from the agreed facts, therefore, is that when Wong Kim Ark returned to the United States from his last temporary visit to China and claimed the right, as a citizen of the United States, to enter the country, in the month of August, 1895, he *was over twenty-one years of age*, and this must be taken to be a *fact* in the case.

The determinate facts in respect to the appellee are, therefore, in effect these:

1. He is a person "born in the United States."
2. His parents, although Chinese subjects and persons of Chinese descent, were, at the time of his birth, domiciled inhabitants of this country, living here under the sanction and protection of the Government and laws of the United



States, and they continued to reside here in that character for seventeen years, at least, after the appellee was born.

Domiciled inhabitants (*subditus temporalis*) are those who, although not having renounced allegiance to their native or original State, have ceased to reside there and have taken a permanent abode in a foreign country, forming a class of inhabitants with regard to civil rights between the subject or citizen and the alien (1 Phillimore, International Law, chap. XVIII, p. 347; *Lau Ow Bew vs. U. S.*, 144 U. S., 60). They are described by Sir Robert Phillimore as "*de facto*, though not *de jure*, citizens of the country of their domicile."

In *Carlisle vs. U. S.* (16 Wall., 148) this Court said:

"Aliens domiciled in the United States owe a temporary and local allegiance to the Government of the United States. They are bound to obey all the laws of the country not immediately relating to citizenship during their residence, and are equally amenable with citizens for any infraction of these laws."

3. He never resided in China, but has resided in the State of California uninterruptedly from the time of his birth, claiming to be a citizen of the United States.

4. He never, either by himself or by his parents acting for him, renounced his allegiance to the United States, or claimed to be a subject of the Emperor of China, or an alien of the United States.

5. He has been in China twice during his life, but he went there, on both occasions, for temporary visits only, and with the intention of returning to the United States, which he deemed his own country.

6. He was seventeen years of age when he made his first visit to China, in 1890. It is not stated as a fact that he was taken there by his parents or even accompanied them

to China; but it does appear that he returned during the same year to the United States, and claimed and was accorded by this Government the right to enter the country as a citizen of the United States.

7. He was more than twenty-one years of age when he reached San Francisco, in August, 1895, upon his return from his second visit to China, and claimed the right to land and proceed to his home in California as a citizen of the United States under the Constitution.

It would appear to be an incontestable proposition that the appellee was born "*subject to the jurisdiction*" of the United States, according to the true meaning of those terms in the citizenship clause of the Fourteenth Amendment of the Constitution, and the intention and understanding of those who framed the amendment and proposed it to the legislatures of the States for adoption, and that he was and is a citizen of the United States.

It was one of his rights, privileges, and immunities when he reached San Francisco, in August, 1895, to enter the United States and proceed to his home in California. (*Crandall vs. Nevada*, 6 Wall., 36; *Slaughter-house Cases*, 16 Wall., 79.)

The intention of the framers of the great Amendment appears to be treated by the Solicitor General in his brief for the United States rather with disdain, and the implied suggestion on the part of the Government, strangely enough, would seem to be that in expounding and giving effect to the article, the Court should proceed upon the view that "its adoption, so far as the ten Southern States were concerned, was of *something more than doubtful validity*, the votes of those States being made by the express terms of the law a condition precedent to the enjoyment and exercise of the right to representation in the Government by which they were

taxed, which derived its just powers from the consent of the governed."

This proposition is preceded in the brief for the Government by the observations that "doubtless the people of the United States have the same power to amend their Constitution which they exercised when that Constitution was ordained and established," and that "if it escaped the inspired sagacity of the framers of that immortal instrument to discern, and remained for the superior virtue and intelligence of the sublime patriots of the reconstruction era to discover, the necessity for a citizenship of the United States, a national citizenship, the power was theirs to propose and with the people to approve and adopt."

The framers of the Amendment were leaders among the statesmen referred to in the brief as "the sublime patriots of the reconstruction era," and no exception can be taken to the observation that if it remained for them to discover the necessity for a national citizenship "the power was theirs to propose and with the people to approve and adopt;" but it is difficult to perceive the object in this case of the particular contention, that the adoption of the amendment was "of *something more* than doubtful validity," or, in other words, invalid, upon the ground asserted in the brief for the Government, unless by the argument it was intended to suggest that some construction should properly be given by this Court to the provisions of the amendment which would fail to promote and give effect to the intention and object of those who framed its declaration in regard to citizenship of the United States and of the States under the Constitution.

Such a suggestion on the part of the counsel of the Government is, of course, inadmissible.

It is true that the framers of the Constitution, unfortunately for the country, failed to perceive, and it was left for the statesmen of the reconstruction period who had carried the Government safely through the great war of the rebel-

lion to discover, the necessity for a definition of citizenship of the United States which should free that citizenship from its disastrous entanglements with State citizenship, for which the country had paid so dearly in costly treasure and still more costly blood ; and, unless the war has not terminated and what is called the "Fourteenth Amendment" is not a valid part of the Constitution of the United States, as maintained by the Solicitor General, the ideas of citizenship entertained by Mr. Calhoun and the other members of the old "State Rights party," as declared in the speech of the great South Carolina leader on the Force bill, in 1833, cited in the Brief for the Government (page 15), are scarcely authority for this Court now and here upon the present question in respect to the citizenship of this appellee.

But we submit, notwithstanding the argument of the Solicitor General, that the dead past long ago buried its dead, and this Court has not erred in supposing that the Fourteenth Amendment is a valid part of the Constitution, and that it is the plain and intended meaning of that article that all persons born upon the soil and subject to the authority and laws of the United States, without distinction of color or race, and irrespective of the nationality, or color, or race, or previous political condition of their parents, are citizens of the United States and of the State wherein they reside.

Another observation in the brief for the Government is that this Court, in the *Slaughter-house Cases* "shattered the idol" of national citizenship, described in the brief as "the offspring of that unhappy period of rabid rage and malevolent zeal when corrupt ignorance and debauched patriotism held high carnival in the halls of Congress," being the same "idol," as we are told, which "the reconstruction Congress" had placed upon so lofty a pedestal." It is quite clear, however, from the description given by the learned counsel of that unfortunate "idol," that no fragments of it are sought here to be reinstated upon its former "lofty pedestal," if it

should appear, indeed, that the pedestal escaped the fury of this Court, in the *Slaughter-house Cases*, as to which we are not advised in the brief for the Government.

In this particular connection, it is interesting to recall the names of the gentlemen who were the members of the Joint Committee on Reconstruction which framed and reported the Fourteenth Amendment. They were: *On the part of the Senate*, William P. Fessenden, of Maine; James W. Grimes, of Iowa; Ira Harris, of New York; Jacob M. Howard, of Michigan; George H. Williams, of Oregon, and Reverdy Johnson, of Maryland; *on the part of the House*, Thaddeus Stevens, of Pennsylvania; Elihu B. Washburn, of Illinois; Justin S. Morrill, of Vermont; John A. Bingham, of Ohio; Roscoe Conkling, of New York; George S. Boutwell, of Massachusetts; Henry T. Blow, of Missouri; A. J. Rogers, of New Jersey, and Henry Grider, of Kentucky. (Blaine, *Twenty Years of Congress*, vol. 2, p. 127.)

As we shall see, the present citizenship clause of the Fourteenth Amendment was suggested in the Senate by Mr. Howard, of Michigan, one of the ablest and most accomplished lawyers of that or any other day in this country, on behalf of the Senate members of the Joint Committee on Reconstruction, and the amendment as proposed by Mr. Howard was agreed to in the Senate without division.

(1.) If it could be imagined that the American statesmen who framed and discussed the terms of the Fourteenth Amendment were not themselves aware of the natural and necessary import of the language employed by them in drafting the citizenship clause of the amendment, and that they did not understand that the clause had the effect which has universally been given to it, yet if the clause as framed and expressed does *in fact* bear the meaning which has been attributed to it, and does extend its protecting shield over those whom it is possible to suppose were not thought of when it was conceived and put in form, it is, nevertheless,

to be presumed that the American people, in giving it their approval, knew what they were doing, and intended to ordain what has in fact been decreed by the terms of the amendment.

But the evidence is abundant and decisive that the statesmen and lawyers who framed the amendment and the definition of citizenship, with which it opens, were themselves perfectly aware of the scope and import of the terms of that definition of citizenship, and that they, in fact, intended to include in and embrace by it, as we have said, all persons born in this country, irrespective of the nationality, or race, or color, or previous political condition of their parents.

(2.) The Fourteenth Amendment set up no "caste or oligarchy of the skin" under the safeguard and protection of the National Constitution.

The framers of the article were in full accord with the doctrines on the subject of citizenship in this country, declared by Mr. Bates, as Attorney General, in the celebrated opinion given by him on November 29, 1862, to Mr. Chase, the Secretary of the Treasury, and which was acted upon by that eminent man, the successor of Taney as Chief Justice of the United States, in his administration of the Treasury Department. The citizenship clause of the great Amendment was, in fact, merely declaratory of the doctrines of national law affirmed by the Attorney General in that opinion. Mr. Bates in part said:

"As far as I know, Mr. Secretary, you and I have no better title to the citizenship which we enjoy than the 'accident of birth'—the fact that we happened to be born in the United States. And our Constitution, in speaking of *natural-born citizens*, uses no affirmative language to make them such, but only recognizes and reaffirms the universal principle, common to all nations, and as old as political society, that the people *born* in a country do constitute the nation, and, as individuals, are *natural* members of the body politic.

"If this be a true principle, and I do not doubt it, it follows that every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the '*natural-born*' right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.

"That *nativity* furnishes the rule, both of duty and of right as between the individual and the government, is a historical and political truth so old and so universally accepted that it is needless to prove it by authority. Nevertheless, for the satisfaction of those who may have doubts upon the subject, I note a few books, which, I think, cannot fail to remove all such doubts: Kent's Com., vol. 2, part 4, sec. 25; Bl. Com., book 1, chap. 10, p. 365; 7 Co. Rep., Calvin's case; 4 Term Rep., p. 300; Doe vs. Jones, 3 Pet., 246; Shanks vs. Dupont, *Ib.*, 242, and see a very learned treatise, attributed to Mr. Binney, in 2 Am. Law Register, 193.

"In the United States it is too late now to deny the political rights and obligations conferred and imposed by nativity; for our laws do not pretend to create or enact them, but do assume and recognize them as things known to all men, because pre-existent and natural, and therefore things of which the laws must take cognizance. Acting on this guiding thought, our Constitution does no more than grant to Congress the power 'to establish a *uniform rule* of naturalization.' And so strongly was Congress impressed with the great legal fact that the child takes its political status in the nation where it is born, that it was found necessary to pass a law to prevent the *alienage* of children of our known fellow-citizens who happen to be born in foreign countries.

\* \* \* But for that act, children of our citizens who happen to be born at London, Paris, or Rome, while their parents are there on a private visit of pleasure or business, might be brought to the native home of their parents, only to find that they themselves were aliens in their father's country, incapable of inheriting their father's land, and with no right to demand the protection of their father's government. That is the law of birth at the common law of England, clear and unqualified, and now, both in England and America, modified only by statutes, made from time to time, to meet emergencies as they arise. \* \* \*

"It is strenuously insisted by some that 'persons of color,' though born in the country, are not capable of being citizens of the United States. As far as the Constitution is concerned, this is a naked assumption, for the Constitution contains not one word upon the subject. The exclusion, if it exist, must, then, rest upon some fundamental fact, which, in the reason and nature of things, is so inconsistent with citizenship that the two cannot coexist in the same person. Is mere *color* such a fact? It has never been so understood nor put into practice in the nation from which we derive our language, laws, and institutions, and our very morals and modes of thought and, as far as I know, there is not a single nation in Christendom which does not regard the new-found idea with incredulity, if not disgust." ("Citizenship," 10 Opinions of Attorneys General, 383-413.)

Less than four years after this opinion was written the Joint Resolution proposing the Fourteenth Amendment passed both Houses of Congress.

Prejudice of *race* and pretension of *caste* were set aside by the Fourteenth Amendment, which ordained in unequivocal and far-reaching terms that "*all* persons born in the United States and subject to the jurisdiction thereof are citizens of the United States."

This declaration in respect to American citizenship is universal in its application to all the persons described, without regard to differences of *color*, of *race*, or of *descent*.

The language cannot by construction or interpretation be confined to white persons and black persons, to the exclusion of yellow persons, or limited in its application to persons of the Caucasian race and persons of African descent, to the exclusion of persons of Mongolian descent.

All persons, of whatever color or race, born in the United States and subject to their jurisdiction are declared to be, by virtue of such birth alone, natural-born citizens of the United States.

And there can be no doubt that every man who voted for the Amendment in Congress was aware of the far-reaching



character of the terms of the first clause of the first section of the article, and believed that no discord and defilement would or could be introduced into the Constitution of the United States through a denial of citizenship, by construction of that section, to any person born on the soil of the country, on account of his color, or his race, or his descent.

(3.) The position assumed by many who dislike the idea of the citizenship of the American-born children of Chinese descent, generally, has been, as we understand, that the framers of the citizenship clause of the Fourteenth Amendment were not aware of the effect of its terms and had in mind only native-born colored persons of African descent, and that although that clause as framed and expressed does, in fact, bear a broader meaning, and does extend to and include native-born persons of Chinese ancestry, such persons are, nevertheless, to be deemed excluded or excepted from its operation. But if the premises of this argument were true, which we deny, the conclusion that notwithstanding the fact that the language of the first section of the article does extend to and embrace children born here of Chinese parents, the provision is to be construed to except and exclude them from its operation, is plainly inadmissible.

As we have observed, it is to be presumed that the American people, in giving the article their *imprimatur*, understood the scope of its terms, and *intended* to decree what has *in fact* been decreed.

(4.) The untenable character of the theory in regard to native-born persons of Chinese descent residing in this country in their relation to the Fourteenth Amendment, just noticed, seems to have compelled the advocates of the nullification of the amendment, in respect to that class of persons, to resort to the extremity of maintaining the extraordinary proposition that the five words, "*subject to the*

*jurisdiction thereof,"* in the first section of the article, operated to completely *recast* the entire law of this country as to nationality of origin, by one of the most radical and extensive *changes* which it could possibly undergo, and that by those five words it was in effect declared and decreed by the American people, contrary to the immemorial law of England and the United States, that all children born of foreign parents within our territory are aliens and not citizens of the United States, and whether or not, as we suppose it is said, the parents were resident and domiciled in this country at the time of the birth of such children.

We have called this an extraordinary proposition. It is hardly too much to say that it is an amazing proposition; and one of the most wonderful things in connection with it is that it appears to be supposed that the new principle of political nationality which it is said the amendment intended to establish for this Government in this country, is a principle of international law, meaning thereby, as we apprehend, the public law of nations, whereas it is an elementary principle of that system of jurisprudence, as every one having the most superficial acquaintance with it knows, that the subject of political nationality in general is one outside of the domain of international law, and that international law prescribes no rules whatever for the government of independent States in claiming or rejecting persons as their citizens or members of their bodies politic.

This remarkable theory in regard to the Amendment, as we understand it, maintains that the article recasted the law of American citizenship by introducing and establishing in this country the principle of deriving nationality of origin, "natural-born" citizenship, from *descent* alone (*jus sanguinis*) and discarding and excluding from our public jurisprudence the principle by which nationality of origin in this country is derived from birth upon the soil (*jus soli*); so that by and under the Amendment no person born in the United States is a citizen unless, at the time of his birth,

his parents were citizens, although they may then have been domiciled inhabitants of the country, and their offspring may desire to possess the character of a citizen of the United States, and may disavow all allegiance or any political relation to the country of his parents' birth.

It is certain that neither the framers of the Amendment nor the people of the United States ever dreamed that the article effected any such change in the law of original American nationality.

Chief Justice Taney, speaking for the majority of the Court in *Dred Scott vs. Sandford*, said that the power granted to Congress by the Constitution to establish a uniform system of *naturalization* is "confined to persons *born in a foreign country, under a foreign government*," and that Congress could confer the character of citizens upon "those *only* who were born OUTSIDE of the dominions of the United States" (18 How., 417, 418). And Mr. Justice Curtis, speaking for the minority of the Court in that celebrated case, said:

"It is not to be doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on *foreign birth*. To hold that it extends further than this, must do violence to the meaning of the term *naturalization*, fixed in the common law (Co. Lit., 8a, 129a; 2 Ves. Sen., 286; 2 B. 2 Com., 293), and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a *native-born citizen* that it was employed in the Declaration of Independence. It was in this sense that it was expounded in the Federalist (No. 42), has been understood by Congress, by the Judiciary (2 Wheat., 259, 269; 3 Wash., 313, 322; 12 Wheat., 277), and by commentators on the Constitution. (3 Story, Com. on Con., 1-3; 1 Rawle on Con., 84-88; 1 Tucker, Bl. Com. App., 255-259.)

"It appears, then, that the only power expressly granted to Congress to *legislate concerning citizenship* is confined to the removal of the disabilities of FOREIGN birth." (18 How., 578.)

Accordingly, those native persons, who are supposed by this new-fangled theory of the Fourteenth Amendment to be excluded from citizenship of the United States by reason of the alienage of their parents, never *can* become citizens of the United States by naturalization, and they are thus doomed by the Constitution to perpetual alienage in the country of their birth, their homes, and their affections.

And it is clear, as it seems to us, that when the few words in the single sentence of the opinion of Mr. Justice Miller in the *Slaughter-house Cases*, which refers to the particular phrase in the Fourteenth Amendment on which the counsel on the other side rely, in this case, are properly interpreted, it will be found that those words furnish no support to the view maintained here on the part of the Government, that it was the intended effect of the article to establish, as the rule of American nationality, that citizenship by birth or origin of children born in this country depends upon the nationality of their parents; so that the children born here of alien parents, or fathers, whether resident or not in the country, are aliens of the United States.

The words in that opinion which are relied upon by the counsel for the Government are these:

“The phrase ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”

The last words of this sentence, “citizens or subjects of foreign States born within the United States,” must certainly have been intended by the learned Justice to apply to persons who, though born in the United States, have *expatriated* themselves, and thus become “citizens or subjects of foreign States,” and to affirm only that such persons were excluded by the phrase in the amendment referred to from the operation of the article. It can hardly be supposed that by those words the learned

Justice meant to declare that it was the view of this Court that by the true meaning and effect of the amendment all children born in the United States of alien parents were aliens and not citizens of the United States, when probably several millions of our population are or claim to be citizens only from the mere fact of birth on the soil of the country, their parents ~~never~~ having been foreigners who never were naturalized under the laws of the United States, and especially when it had become the settled doctrine of this Court that such native-born persons were themselves not the lawful subjects of naturalization, and could not acquire citizenship under any constitutional legislation of Congress.

(5.) Before closing this preliminary statement it is proper to advert to the effect of any construction of the Fourteenth Amendment by which the citizenship of natives of this country is made to depend upon the citizenship or nationality of their parents, with respect to the political condition, relation, and rights of colored persons of African descent born in the United States.

Under such a construction of the article, persons born in the country being excluded from citizenship unless, at the time of their birth, their parents, or fathers at least, were citizens of the United States, it is difficult to perceive how native colored persons of the African race became or can become citizens of the United States, by virtue of the Amendment, under the doctrine of the *Dred Scott Case*, that free colored persons of African descent, natives of the country, were not and could not be citizens of the United States under the Constitution.

"This decision," as observed by Mr. Justice Miller in the *Slaughter-house Cases*, "while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made

freemen were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution."

But if, by any principle or rule of nationality declared by the Fourteenth Amendment, persons born in the country are not citizens unless their fathers, at least, were citizens, it would clearly seem that native children of the colored African race, whose fathers were not and could not be citizens, were and are incapable of being or becoming citizens of the United States, under the Amendment, by reason of the original condition of their parents. They could not acquire from their fathers a character which their fathers had not themselves to impart.

If the Amendment has established the rule that the child born in our country follows the political condition or nationality of the parent, the article has simply perpetuated here a race of persons, who are in all legal respects aliens of the United States.

## ARGUMENT.

### First.

*The legislative history of the Fourteenth Amendment discloses that it was in fact the actual intention of the framers of the citizenship clause of the article to include therein the American-born children of Chinese parents, and that it was believed by every one in Congress who participated in the discussion of that provision that those persons were not excluded or excepted from its operation by reason of their color or race or the alienage or political condition of their parents, and that by that clause they were effectually declared to be citizens of the United States.*

1. The formal and final report of the Joint Committee on Reconstruction was made to the House of Representatives by Mr. Stevens on Monday, the 30th of April, 1866. It consisted of a Joint Resolution (H. R. No. 127) proposing a Fourteenth Amendment to the Constitution of the United States, the first section of which declared as follows :

“SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”\*

The proposed constitutional amendment came to a vote in the House on the 10th of May, and the result was 128 ayes to 37 noes.

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\*The form in which the Fourteenth Amendment (consolidated from various propositions previously discussed) was originally reported from the committee by Mr. Stevens will be found in Mr. Blaine's work, vol. 2, p. 214.

When the Senate, as in Committee of the Whole, on May 23, 1866, proceeded to consider the Joint Resolution, it soon became evident that it could not be adopted in the form in which it came from the House. The first important change was suggested by Mr. Howard, of Michigan, on behalf of the Senate Members of the Joint Committee on Reconstruction, who moved to amend the Joint Resolution by affixing to the first section of the proposed constitutional Amendment these words :

"All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

Congressional Globe, part 3, 1st sess., 39th Cong., pp. 2765, 2869.

Mr. Howard stated that he deeply regretted that the state of the health of Senator Fessenden prevented him from opening the discussion, and proceeded at once to comment upon the first clause of the first section of the House Joint Resolution, which related to the privileges and immunities of citizens of the United States as distinguished from all other persons not citizens of the United States, but contained no definition of the expression, "citizens of the United States."

He, in part, said :

"It is not, perhaps, very easy to define with accuracy what is meant by the expression, 'citizen of the United States,' although that expression occurs twice in the Constitution—once in reference to the President of the United States, and again in reference to Senators, who are likewise to be citizens of the United States.

"Undoubtedly, the expression is used in both those instances in the same sense in which it is employed in the amendment now before us.

"A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws."



After referring to the provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," Mr. Howard said :

"The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. And how did they antecedently become citizens of the several States? By birth or by naturalization. They became such in virtue of national law or, rather, of natural law, which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were therefore citizens of the United States *as were born in the country or were made such by naturalization*, and the Constitution declares that they are entitled, as citizens, to all the privileges and immunities of citizens in the several States. They are, by constitutional right, entitled to these privileges and immunities and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union."

When the Senate, as in Committee of the Whole, on May 30, 1866, resumed the consideration of the Joint Resolution, Mr. Howard stated that there was a typographical error in his first amendment, as the word "State" was printed "States." He said :

"It should be in the singular instead of the plural number, so as to read, 'all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the *State* (not States) wherein they reside.' I move that this correction be made."

The correction was accordingly made. (Congressional Globe, 1st sess., 39th Cong., part 4, pp. 2890 to 2897.)

The debate in the Senate was begun by Senator Howard, who stated expressly and explicitly the intended object and scope and effect of his first amendment to the House Joint Resolution, as follows :

"The first amendment is to section one, declaring that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.' I do not propose to say anything on that subject, except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States and subject to their jurisdiction is, by virtue of natural law and national law, a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country." (*Ib.*, p. 2890.)

It is impossible to doubt, in the presence of this language, that the learned Senator, who was the draftsman of the citizenship clause, on behalf of the Senate members of the Joint Committee on Reconstruction, actually intended by the words employed by him to include in that provision the American-born children of Chinese parents, and that it was not intended by the qualifying phrase, "*subject to the jurisdiction thereof*," to except those persons from the operation of the provision on account of their race, or descent, or the alienage or political condition of their parents.

The intention, by the qualifying phrase, as explained by Mr. Howard, was to except from the operation of the amendment those persons who, although born in the limits of the United States, were regarded by the rules of the public law of nations received in the United States as entitled to an exemption from our local laws and jurisdiction.

The explanation that the provision was not meant to include the children born in the United States of foreign

diplomatic agents, shows necessarily and conclusively that it was not intended by the qualifying phrase in question to except from the amendment the children born in the United States of *other* subjects or citizens of foreign powers, or to introduce in this country any principle or rule that *descent*, and not the *place of birth*, is the primary criterion or source of nationality.

After this explanation of Senator Howard, Mr. Doolittle, of Wisconsin, said :

"I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment—I presume he will have no objection to it—by inserting after the word 'thereof' the words 'excluding Indians not taxed.'"

Senator Howard replied :

"I hope that amendment to the amendment will not be adopted. Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been, in our legislation and jurisprudence, as being *quasi* foreign nations."

Mr. Cowan, of Pennsylvania, then asked, "[Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy, born in Pennsylvania, a citizen?"]

Senator Cowan's speech was merely a harangue against the expediency of including those persons in a constitutional definition of citizenship.

Senator Conness, of California, replied promptly and decisively that the proposition before the Senate *was* to incorporate in the Constitution of the United States a provision declaring that "*the children begotten of Chinese parents, in California, shall be citizens,*" and that he was in favor of the proposition.

Mr. Conness, in part, said :

" If my friend from Pennsylvania, who professes to know all about Gypsies and little about Chinese, knew as much of the Chinese and their habits as he professes to know of the Gypsies, he would not be alarmed in our behalf *because of the operation of the proposition before the Senate*, or even the proposition contained in the Civil Rights Bill, so far as it involves the Chinese and us.

" The proposition before us, I will say, Mr. President, relates simply in that respect to the *children begotten of Chinese parents in California*, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that *the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States*, entitled to equal civil rights with other citizens of the United States." (*Ib.*, p. 2891.)

Mr. Conness, after stating from the facts he mentioned that the progeny of the Chinese in this country would necessarily be insignificant, and begging the Senator from Pennsylvania to confine his attention to the Gypsies and give himself no further trouble about the Chinese in California or on the Pacific coast, said :

" Here is a simple declaration that a score or a few score of human beings born in the United States shall be regarded as citizens of the United States, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens; and that such a provision should be deprecated by any person having or claiming to have a high humanity passes my understanding and comprehension. \* \* \*

" We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others." (*Ib.*, p. 2892.)

Not a word of contradiction or doubt was interposed by any Senator to this very distinct statement of the intended meaning and effect of the proposed amendment of Senator Howard in respect to the citizenship of the American-born children of the Mongolian race, as made by the junior Senator from California. His colleague, Mr. McDougall, on the other side in politics, was present and voted on that day in the Senate, and subsequently took part in the debate on the proposed constitutional amendment, but he made no reference to the subject of children born of Chinese parents in the United States, and no word escaped from him suggesting any different view of the intention and effect of that provision.

It appears to have been the universal understanding on both sides of the Senate Chamber that it was the intention and effect of the language of the citizenship clause of the proposed amendment to declare that the American-born children of Chinese subjects were citizens of the United States upon the same and an equal footing with the children of the subjects or citizens of other foreign powers born in the United States.

Senators having apparently agreed that the proposed citizenship clause included the children born here of Chinese parents, and declared them to be citizens, the rest of the debate on that clause related to the amendment of Mr. Doolittle, "excluding Indians not taxed," in respect to which Mr. Howard said that if the amendment was adopted "all that would remain to be done on the part of any State would be to impose a tax upon the Indians, whether in their tribal condition or otherwise, in order to make them citizens of the United States." \* \* \* "The great objection, therefore, to the amendment is, that it is an actual naturalization, whenever the State sees fit to enact a naturalization law in reference to the Indians, in the shape of the imposition of a tax, of the whole Indian population within their limits." (*Ib.*, p. 2895.)

Mr. Howard showed that it could not be maintained that the members of an Indian tribe, although born within the limits of a State and the United States, were "subject to the jurisdiction of the United States," in the sense of his amendment, inasmuch as, agreeably to the settled principles of American jurisprudence, they were not subject to the operation of our laws and the jurisdiction of our courts, but were born under and subject to the authority and government of their tribe or nation. He said :

"I concur entirely with the honorable Senator from Illinois in holding that the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, co-extensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction, in extent and quality, as applies to every citizen of the United States. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. That question has long since been adjudicated, so far as the usage of the Government is concerned.

"The Government of the United States has always regarded and treated the Indian tribes within our limits as foreign powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, and in the Constitution itself is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with the Indian tribes. That clause, in my judgment, presents a full and complete recognition of the *national character of the Indian tribes*. \* \* \*

"Our legislation has always recognized them as sovereign powers. The Indian who is still connected by his tribal relation with the government of his tribe is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal. I believe that has been the uniform course of decision on that subject. The United States have no power to punish an Indian who is

connected with a tribe for a crime committed by him upon another member of the same tribe.

Mr. FESSENDEN: Within the territory?

Mr. HOWARD: Yes, sir. Why? *Because the jurisdiction of the nation intervenes and ousts what would otherwise be, perhaps, a right of jurisdiction of the United States.*" (*Ib.*, p. 2895.)

It thus appears that there was no more intention by this amendment to set aside or abandon our established doctrines in respect to the Indian tribes and their members than there was to uproot or abandon the recognized principle of our law in respect to the effect of the place of birth in the matter of nationality. The amendment was not intended to affect either of those departments of our law. It was a conservative and not a revolutionary measure.

Mr. Johnson, of Maryland, in advocating the amendment proposed by Mr. Doolittle, said that the Indians, "independent of the manner in which we have been dealing with them, are subject to the jurisdiction of the United States, *as is anybody else who may be born within the limits of the United States.*" He stated: "What I mean to say is, that over all the Indian tribes within the limits of the United States the United States *may*—that is the test—exercise jurisdiction."

Senator Williams, of Oregon, said:

"I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States; but I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. \* \* \*

"Indians not taxed are not even entitled to be counted as persons in the basis of representation under any circumstances. \* \* \*

"I think it perfectly clear, when you put the first and second sections together, that Indians *not taxed* are excluded from the term 'citizens,' because it cannot be supposed for one moment that the term 'citizens,' as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis

of representation. I do not believe that Indians not taxed are included, and I understand that to be a description of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States." (*Ib.*, p. 2897.)

As the result of the discussion Mr. Doolittle's amendment was supported by only ten Senators on a call of the *ayes* and *noes*, and the amendment of Mr. Howard was agreed to without a division. (*Ib.*, p. 2897.)

On June 8, 1866, the Senate, as in Committee of the Whole, resumed the consideration of the proposed amendment to the Constitution, when Mr. Henderson, of Missouri, eminent for his abilities and virtues as a lawyer and statesman, discussed the citizenship clause of the first section of the article in a carefully prepared address, showing that the Constitution, as it then was, recognized all free persons born on the soil of the States as natural-born citizens of the United States, and that the proposed amendment was founded upon that principle of our law of nationality. He cited the declaration of Mr. Justice McLean in the *Dred Scott Case*:

"Being born under our Constitution and laws, no naturalization is required, as one of *foreign birth*, to make him a citizen."

Mr. Henderson thought that if the opinion of Mr. Justice Curtis in that famous case was open to criticism at all, it was his conclusion "that it is left to each State to determine what free persons born within its limits shall be citizens of such State, and thereby be citizens of the United States," and the error of this conclusion, he said, was shown in the opinion delivered by Chief Justice Taney. (*Ib.*, pp. 3031-3033.)

Evidently Senator Henderson did not suppose that it was intended by any phrase or word in the amendment as expressed to exclude or except the native-born children of the



subjects or citizens of any foreign States from the operation of the article.

On the same day Mr. Fessenden proposed to amend the amendment of Mr. Howard by general consent by inserting after the word "born" the words "or naturalized," so that the clause should read :

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

This amendment was agreed to. (*Ib.*, p. 3042.)

On the final passage of the amendment in the Senate the *ayes* were 33 and the *noes* 11. (*Ib.*, p. 3042.)

Among the *ayes* was Senator Sumner, who never would have voted for it if he supposed any doubt could exist as to its including and embracing all native-born persons, for it was his speech on the doctrine of Human Rights, filling forty-one columns of the "Globe," on the 6th of February, 1866, that set the current of public thought in the direction of the Fourteenth and Fifteenth Amendments.\*

When the Joint Resolution, as amended by the Senate, was returned to the House on June 13, Mr. Stevens briefly explained the changes, stating that the first section was altered to define who were citizens of the United States and of the States, which he regarded as an excellent amendment, and on the same day the House concurred in all of the Senate amendments by a vote of—*ayes*, 120; *noes*, 32. (*Ib.*, pp. 3148, 3149.)

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\* "According to the best testimony now, the population of the earth—embracing Caucasians, Mongolians, Malays, Africans, and Americans—is about thirteen hundred millions, of whom only three hundred and seventy-five millions are 'white men,' or little less than one-fourth; so that in claiming exclusive rights for 'white men' you degrade nearly three-quarters of the Human Family, made in the 'image of God' and declared to be of 'one blood,' while you sanction a Caste offensive to religion, an Oligarchy inconsistent with Republican Government, and a Monopoly which has the whole world as its footstool." (Speech of Mr. Sumner, Cong. Globe, part I, 1st Sess., 39th Cong., p. 687.)

II. The Joint Resolution proposing the Fourteenth Amendment was immediately preceded by the Civil Rights Act of April 9, 1866, "*to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,*" passed over the President's veto, which provided that "all persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." (14 Stats., 27.)

It is clear not only that both these expressions, "*and not subject to any foreign power,*" "*and subject to the jurisdiction thereof,*" are the same in meaning, but that each definition, the first as well as the second, was intended to include all persons of domestic birth without regard to the race or the alienage of their parents.

The legislative history of the qualifying phrase, "*and not subject to any foreign power,*" as used in the Civil Rights Act, shows specifically that it was intended to except from the general rule of citizenship the children born in the United States of resident foreign diplomatic agents, and was not intended to except the children of Chinese or other aliens born in this country.

The first amendment offered by Senator Trumbull to the original Civil Rights Bill, which, as introduced by him and reported by him from the Senate Judiciary Committee, contained no provision declaring what should constitute citizenship, was in these words :

"All persons of African descent born in the United States are hereby declared to be citizens of the United States."

Congressional Globe, part I, 1st sess., 39th Cong., p. 474.

Mr. Trumbull on the next day, January 30, 1866, offered as a substitute for his own amendment the following :

"All persons born in the United States and not subject to any foreign power are hereby declared to be citizens of the United States without distinction of color." (*Ib.*, p. 498.)

Mr. Guthrie, of Kentucky, and Mr. Howard, of Michigan, both asked whether that would make citizens of all the Indians in the United States. Mr. Trumbull thought not, because we deal with the Indians as foreigners—as separate nations—by treaty and not by law, with certain exceptions, but he was willing to change it so as specifically to exclude Indians.

Mr. Cowan asked whether the amendment “will not have the effect of naturalizing the children of *Chinese* and Gypsies born in this country,” to which Mr. Trumbull replied, “*Undoubtedly.*” Mr. Cowan then said that it would be proper to hear the Senators from California on that question. Mr. Trumbull inquired of the Senator from Pennsylvania “*if the children of Chinese now born in this country are not citizens.*” Mr. Cowan thought that they were not, when Mr. Trumbull asked, “Is not the child born in this country of German parents a citizen?” Mr. Cowan’s reply was:

“The children of German parents are citizens, but Germans are not Chinese; Germans are not Australians, nor Hottentots, nor anything of the kind. That is the fallacy of his argument.”

To this Senator Trumbull replied:

“If the Senator from Pennsylvania will show me in the law any distinction made between the children of German parents and the children of Asiatic parents, I might be able to appreciate the point which he makes; but the law makes no such distinction, and the child of an Asiatic is just as much a citizen as the child of a European.” (*Ib.*, p. 498.)

[It is observable that neither of the Senators from California, although both participated in the debate on the bill, controverted this declaration of the Senator from Illinois.]

In fact, Senator Cowan was the only member of either House who referred to the question as to the effect of the Civil Rights Bill in respect to the children of Chinese born in the United States.

Mr. Trumbull, in further discussing the amendment concerning citizenship, on February 1, 1866, said :

"The Senator from Missouri (Mr. Henderson) and myself desire to arrive at the same point precisely, and that is to make *citizens of everybody born in the United States* who owe allegiance to the United States. We cannot make a citizen of the child of a *foreign minister* who is temporarily residing here. There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and who owe allegiance to it. I thought that might perhaps be the best form in which to put the amendment at one time—'that all persons born in the United States and owing allegiance thereto are hereby declared to be citizens'—but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it *whom we would have no right to make citizens*, and that that form would not answer. Then it was suggested that we should make citizens of all persons born in the United States, not subject to any foreign power or tribal authority. The objection to that was, that there were Indians not subject to tribal authority who were yet wild and untamed in their habits, who had by some means or other become separated from their tribes, and were not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction. Then it was proposed to adopt the amendment as it now stands—that all persons born in the United States not subject to any foreign power, excluding Indians not taxed, shall be citizens." (*Ib.*, p. 572.)

The friends of the Civil Rights Bill, who included on that occasion Senator Reverdy Johnson, of Maryland, accepted Mr. Trumbull's view, that the only persons born in the United States subject to any foreign power, in the meaning of the qualifying phrase, were the children of the representatives of foreign powers residing temporarily in this country, and that by the "Indians not taxed" were meant all who were not counted in the enumeration of the people of the United States, as provided in the Constitution.

Mr. Johnson, of Maryland, suggested that it was advis-

able to omit the words "without distinction of color." He said :

"The amendment as it stands is that all persons born in the United States, and not subject to a foreign power, shall, *by virtue of birth*, be citizens. To that I am willing to consent; and that comprehends *all persons, without any reference to race or color, who may be so born*. That being so, why is it necessary to add to the amendment the words 'without distinction of color'?" (*Ib.*, p. 573.)

Mr. Trumbull thought that the provision concerning citizenship was merely declaratory of what already existed as law, and that the only reason for retaining those words was that there might be no dispute that the word "persons" means "*everybody*." (*Ib.*, p. 573.)

The language finally adopted for the Civil Rights Bill was :

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

On April 4, 1866, the Senate took up the veto message of the President, and the discussion was opened by Mr. Trumbull. (Congressional Globe, part 2, 1st sess., 39th Cong., pp. 1755-1761.)

After referring to the opinion of Mr. Bates as Attorney General, given to Mr. Chase in 1862, adopted by Mr. Lincoln's administration, and acted upon since by all departments of the executive government, and also the opinion of Mr. Marcy as Secretary of State, that all free persons born in the United States were citizens, he said :

" 'If,' says the President, 'as is claimed by many, all persons who are native born already are, by virtue of the Constitution, citizens of the United States, the passage of the pending bill cannot be necessary to make them such.' That is true, but is the President to learn now for the first time that rule to be found in the very horn-hooks of the law,

that an act declaring what the law is, is one of the most common of acts passed by legislative bodies? My opinion is, such was the opinion of the Attorney General (Mr. Bates), such the opinion of the present Secretary of State (Mr. Seward), such the opinion of Mr. Lincoln's administration in all its departments, such, I believe, to be the prevailing opinion in the United States, that all native-born persons, not subject to a foreign power, are, *by virtue of their birth*, citizens of the United States. But some dispute this, and hence for greater certainty it is proper to pass this law, and the fact of its being a declaratory act is now made a reason for disapproving it by a President. \* \* \* The President also has an objection to making citizens of Chinese and Gypsies. I am told that but few Chinese are born in this country, and where the Gypsies are born I never knew. \* \* \* But, sir, the granting of civil rights does not and never did carry with it (political) rights, or, more properly speaking, political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office."

Mr. Trumbull, continuing, asked, "How is it that every person born in these United States owes allegiance to the Government?" And he proceeded to maintain that this allegiance entitled the native-born person to protection as a citizen of the United States. "Allegiance and protection are reciprocal rights." (*Ib.*, p. 1757.)

It was thus agreed, on this occasion, both by the President and Senator Trumbull—that is to say, by the enemies as well as the friends of the measure—that by the first section of the Civil Rights Bill the children of the Chinese of the Pacific States, the children of the people called Gypsies, the Indians subject to taxation, as well as the entire race designated as black—people of color, negroes, mulattoes, and all persons of African blood—born in this country, were declared to be citizens of the United States.

The constitutional Amendment proposed by the same Congress was intended to cover identically the same ground in respect to citizenship as the Civil Rights Act.

## Second.

*This brief review of the history of the Fourteenth Amendment and the Civil Rights Act in the same Congress discloses that those who framed and adopted the citizenship clause of the Amendment intended that the phrase "subject to the jurisdiction thereof," in that provision, should create no exception to the declared principle and rule in respect to natural-born citizenship of the United States which would exclude the American-born children of any foreigners on account of the alienage of their parents.*

I. The debates in Congress to which we have referred show that the framers of the Amendment were impressed by the fact that neither the Constitution nor laws of the United States, before the Civil Rights Act, expressly defined citizenship of the United States or what constituted a citizen of the United States, although it is clear they regarded the former as descriptive of membership of the national body politic and the latter as expressive only of the political *status* or quality of a person in his relation to the United States.

Both Mr. Howard, the author of the citizenship clause of the Amendment, and Mr. Trumbull, the draftsman of the Civil Rights Bill, declared that citizenship under the Constitution had no necessary dependence on or coexistence with the right of suffrage, which they said was "merely the creature of law."

It was observed also in the course of the discussions that, while the Constitution contained no express definition of the word "citizen," it nevertheless used the term as a word the meaning of which was already established and well understood, and recognized a class or description of citizens of the United States called "*natural-born*" citizens, consti-

tuted such from the fact of their having been "born" within the United States, without expressly declaring what persons so born were or were not "natural-born" citizens, and also a class or description of citizens of the United States who were *not* "natural-born," but were made citizens by the process of naturalization, a process concededly applicable under the Constitution only to persons who were not "born" within the United States, but were born outside of their dominions.

As has been said, it was universally agreed when the Constitution was adopted, and it was understood by the framers of the Fourteenth Amendment, that the power given to Congress to prescribe an uniform rule of naturalization was merely a power to provide for the removal of the disabilities consequent on alienage by *foreign birth*, and to confer on an alien—that is to say, a person born out of the jurisdiction of the United States—the rights and powers of a "natural-born" citizen.

"No person shall be a Representative who shall not have \* \* \* been seven years a *citizen* of the United States."

"No person shall be a Senator who shall not have \* \* \* been nine years a *citizen* of the United States."

"No person except a *natural-born citizen*, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President."

"The Congress shall have power to establish an uniform rule of naturalization."

It appears from the debates that these provisions of the Constitution were constantly in the minds of the framers of the citizenship clause of the Fourteenth Amendment, and it is with reference to them and the principles of law to which they referred, as understood by the framers of that clause, that the provision contained in it must necessarily be interpreted.

As the Constitution contemplated the existence of a description of citizens called "natural-born" citizens, and that



citizenship of the United States was impressed upon persons by birth within the United States, without declaring in terms what native-born persons were, from the fact of their birth within the country, "natural-born" citizens of the United States, it was proposed by the Amendment to declare expressly that *all* persons "born" in the United States and subject to its jurisdiction, are, *by the fact of their having been so born*, citizens of the United States—that is to say, natural-born citizens of the United States.

The great object of the citizenship clause of the Amendment, in the minds of its framers, was to set at rest any controversy or doubt as to the rule of original and natural nationality under the Government of the United States, and its application, by expressly declaring that *all* persons born within the United States and subject to their laws, are, by virtue of the *place of their birth*, natural-born citizens of the United States, agreeably to the "principle of public law" recognized by the Constitution, as observed by Mr. Justice Curtis, that "birth on the soil of a country both creates the duties and confers the rights of citizenship." (19 How., 578.)

II. The discussions in the Senate to which we have referred, show that the framers of the citizenship clause understood that the provision, as expressed by them, was only *declaratory* of the principle and rule recognized, as they believed, by the Constitution, that all free persons, of whatever race or parentage, born in this country and subject to its laws, are, by reason of their place of birth, natural-born citizens of the United States.

It was believed that the Constitution expressly recognized the fact of birth on the soil of the country and not descent as the test and rule for determining nationality.

Any idea that these statesmen and lawyers of America proposed to introduce in this country, under our Constitution, the rule of the Code Napoleon or any continental code is one of the wildest of dreams, and not a word they said supports such a theory.

(a.) Senator Howard, as we have seen, in introducing the citizenship clause, on May 23, 1866, as an addition to the first section of the House Joint Resolution, stated that the expression citizen of the United States in the Constitution and in the amendment proposed by him was used, in his view, in the same sense; and he said:

"A citizen of the United States is held by the courts to be a person who was *born within the limits of the United States and subject to their laws.*"

This is, in substance, the definition of a natural-born citizen of the United States, under the Constitution, adopted by Vice-Chancellor Sandford in the celebrated case of *Lynch vs. Clark* (1 Sand. Ch., 656, 663), decided in 1844.

This case, no doubt, was in the mind of the Senator; and it adjudged that the question, Who is a citizen of the United States? was determinable, under the Constitution, by reference to the *English common law*, which at the time of its adoption was, to a greater or less extent, recognized as the law of all the States; and it was expressly determined that a person born within the limits and jurisdiction of the United States was a natural-born citizen without regard to the political condition or nationality of his parents.

The language of Senator Howard shows that he used the phrase, subject to the "jurisdiction" of the United States, in his amendment, as equivalent to, subject to the "laws" of the United States, and he had no intention that

the expression in his amendment should have any more extended or different meaning.

It is manifest also from the language of Mr. Howard that he regarded the *place of birth*, and not *descent*, as the natural and proper test of citizenship or nationality.

"The effect," he said, "of this clause of the Constitution (article IV, section 2) was to constitute *ipso facto* the citizens of each one of the several States citizens of the United States. And how," he asked, "did they antecedently become citizens of the several States? By *birth* or *naturalization*. They became such in virtue of national law, or rather of natural law, which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were, therefore, *citizens of the United States* as were *born in the country* or were *made* such by naturalization."

(b.) The same Senator, on the day his amendment passed the Senate, said again that his proposition was simply declaratory of the existing law of the land, as he understood it, and that by virtue of natural law and national law every person born within the limits of the United States, and subject to their jurisdiction, was a citizen. This, he stated, would not include persons born in the United States belonging to the families of foreign ambassadors or ministers accredited to the Government of the United States. No member of the Senate questioned the correctness of this view of the amendment.

Mr. Reverdy Johnson, of Maryland, who had argued the *Dred Scott Case*, and who was present in the Senate, did not controvert this construction of the measure.

(c.) When the Senate, on the same day, passed to the question of "Indians not taxed," Mr. Howard stated again, in effect, that by "subject to the jurisdiction thereof" was meant subject to the authority of the laws of the United

States, from the operation of which tribal Indians were exempted, and they were, therefore, necessarily excepted, he said, from the operation of his amendment.

(d.) It is apparent also from the discussion in the Senate on the Civil Rights Bill that the same qualification, expressed only in different language in that bill, was meant to create no exception to what was regarded by the authors of the bill as the rule under the Constitution for determining the citizenship of children born in this country—namely, the locality of their birth—and that it was supposed that the persons born in the United States, “not subject to a foreign power,” within the meaning of that bill, were the children of diplomatic agents of foreign governments temporarily residing in the United States, who were exempt by positive international law from our jurisdiction and laws.

It has been seen from the debates on the Civil Rights Bill that Senator Trumbull was in complete accord with the principles in relation to American citizenship declared and maintained by Attorney General Bates in the opinions given by him, in 1862, to the Secretary of the Treasury and the Secretary of State, during the first term of President Lincoln’s administration, and there can be no just doubt that it was distinctly intended by their framers that the Civil Rights Bill as well as the citizenship clause of the Fourteenth Amendment should embody and declare the doctrine of those opinions, accepted as law by the Executive Department of the Government, that national citizenship and alienage were national subjects, and that birth on the soil, and not descent, was the basis and criterion of citizenship of the United States under our Constitution. (Citizenship, 10 Opinions Att’y’s Gen’l, 382; Case of Mrs. Preto and Daughter, *Ib.*, 321; Citizenship of Children Born in the United States of Alien Parents, *Ib.*, 328.)

In his leading opinion on this subject from which we have already quoted, Mr. Bates said :

"In my opinion, it is a great error, and the fruitful parent of errors, to suppose that *citizens* belong exclusively to republican forms of government. English subjects are as truly citizens as we are, and we are as truly subjects as they are. Imperial France, following imperial Rome, in the text of her laws, calls her people citizens (*Les Codes Français*, Book 1, title 1, cap. 1, and notes). And we have a treaty with the present Emperor of the French stipulating for reciprocal rights in favor of the *citizens* of the two countries respectively.

"It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law." (10 Ops., 399.)

In the *Case of Mrs. Preto and Daughter*, it appeared that the former was born in New Jersey and became the wife of a Spanish subject by marriage in the city of Washington, and that the daughter was born in that city. Mr. Bates, in his opinion, to Mr. Seward, held that both were citizens of the United States. "It is clear," he said, "that Miss Griffith did not lose her American citizenship by the fact of marrying Mr. Preto; and, to my mind, it is equally clear that her daughter, born here in Washington, was born an American citizen." (*Ib.*, p. 323.)

In his third opinion, Mr. Bates said to the Secretary of State that children born in the United States of alien parents, who were never naturalized, are "native-born" citizens of the United States. "I might sustain this opinion," he said, "by a reference to the well-settled principle of the common law of England on this subject; to the writings of many of the earlier and later commentators on our Constitution and laws; to the familiar practice and usage of the country in the exercise of the ordinary rights and duties of citizenship; to the liberal policy of our Government in extending and recognizing these rights and

enforcing these duties ; and, lastly, to the *dicta* and decisions of many of our national and State judicial tribunals ; but all this has been well done by Assistant Vice-Chancellor Sandford, in the case of *Lynch vs. Clarke* (1 Sand. Ch. Rep., 583), and I forbear. I refer to his opinion for a full and clear statement of the principle, and of the reasons and authorities in its support. Of course, you will understand that I do not affirm the rule in such exceptional cases as the birth of the children of foreign ambassadors and the like." (*Ib.*, pp. 328, 329.)

The first and principal opinion of Attorney General Bates on "Citizenship," given to Secretary Chase, in November, 1862, was, in fact, the forerunner of the Civil Rights Bill and the citizenship clause of the Fourteenth Amendment.

### Third.

*By the common law of England, nationality of origin depends upon and is dictated by the place of birth and not descent ; and that was the law of all the States at the time of the Revolution and the adoption of the Constitution.*

I. As has been said, primarily it is a question for the municipal law of each nation to decide, whether a given individual is to be considered a subject or citizen or an alien of that nation ; and every sovereign State has the undoubted right to impress by its municipal law the quality or character of a subject or citizen upon the offspring of a subject or citizen of another power who may be born within its territorial jurisdiction. This right is a necessary concomitant of the doctrine of the independence of a sovereign State.

The law of nations expresses no preference whatever for the rule established by affirmative municipal legislation in some countries by which a child follows the nationality or citizenship of his parent.

It is left open to States by international law to act as they like in respect to their rules of political nationality.

By the law of France, anterior to the Revolution, as we understand, all persons born on French soil were Frenchmen, whether their parents were Frenchmen or foreigners, and mere birth within the kingdom gave them the rights of natural-born subjects, independently of the origin or residence of their parents. (Pothier, *Traité des Personnes et des Choses*, partie 1, tit. 2, sec. 1 ; see Drummond's case, 2 Knapp P. C. C., 308, for the old French law of allegiance.)

It was formerly, indeed, what the eminent French jurist, M. Demolombe, calls "the rule of Europe"—"*règle Européenne*"—that the nationality of children born of the subjects of one power within the territory of another was

dictated by the place of their birth, in the view at least of the State of which they were natives. (Cours de Code Napoleon, liv. 1, tit. 1., chap. 1, Nos. 146. 163.)

By the Code Napoleon, March 8, 1803, it was provided that the child born in France should follow the nationality of his father, but that the *place of birth* should have effect to give to the child of an alien, born on French soil, the right, within a year following the attainment of his majority, to claim French citizenship on making a declaration and fixing his domicile in France. (Code Napoleon, "Code Civil," liv. 1, c. 1.)

As we understand the Code Napoleon, it makes the naturalization of the child of a foreigner born in France, who, during the year following the attainment of his majority, elects to be French, *date back to the time of his birth*.

II. By the English common law all persons born within the dominions of the Crown, no matter whether of English or foreign parents, and in the latter case, whether the parents were settled or merely temporarily sojourning in the country, were natural-born British subjects, except the children of foreign ambassadors (who were exempt and enjoyed immunity from the territorial jurisdiction) or a child born to a foreigner during the hostile occupation of British territory.

[The exception in favor of the children of foreign ambassadors resulted from the immunity of such diplomatic agents from the local territorial jurisdiction, "incorporated with the positive law of nations and established, no doubt, before the age of Elizabeth" (1 Hallam, Constitutional History of England, 165; Hall, International Law, 4th ed., § 50 to 180). Mr. Hall says: "For some purposes, also, a diplomatic agent is distinctly considered as being not so much privileged as *outside the jurisdiction*. Thus, children born to him within the State to which he is accredited are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so."]



In *Calvin's Case*, with reference to natural-born subjects, it is said :

“There be regularly (unless it be in special cases) three incidents to a subject born : 1. That the parents be under the actual obedience of the King ; 2. That the place of his birth be within the King's dominions ; and, 3. The time of his birth is chiefly to be considered, for he cannot be a subject born of one kingdom that was born under the ligeance of a king of another kingdom, albeit afterwards one kingdom descend to the King of the other. 1. For the first, it is termed actual obedience, because the King of England hath absolute right to other kingdoms or dominions, as France, Aquitain, Normandy, etc., yet, seeing the King is not in actual possession thereof none born there since the Crown of England was out of actual possession thereof, are subjects to the King of England. 2. The place is observable, but as so many times ligeance or obedience, without any place within the King's dominions, may make a subject born ; but any place within the King's dominions without obedience can never produce a natural subject. And therefore, if any of the King's ambassadors in foreign nations have children there of their wives, being English women, by the common laws of England they are natural-born subjects, and yet they are born out of the King's dominions. (Cr.Car., 601, 602. March, 91. Jenk.Cent., 3.) But if enemies should come into any of the King's dominions and surprise any castle or fort and possess the same by hostility and have issue there, that issue is no subject to the King, though he be born within his dominions ; for he was not born under the King's ligeance or obedience. But, 3, the time of his birth is of the essence of a subject born ; for he cannot be a subject to the King of England unless he was under the ligeance and obedience of the King.” (Lord Coke's Report of *Calvin's Case*, State Trials, vol. 2, p. 639.)\*

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\* “It was held by twelve judges out of fourteen, in *Calvin's Case*, that the *post-nati*, or Scots born after the King's accession, were natural subjects of the King of England. This is laid down, and irresistibly demonstrated by Coke, the chief justice, with his abundant legal learning. \* \* \* There are many doubtful positions scattered through the judgment in this famous case. Its surest basis is the long series of precedents, evincing that the natives of Jersey, Guernsey, Calais, and even Normandy and Guienne, while these countries appertained to the Kings of England, though not in right of its Crown, were never reputed aliens.” (1 Hallam, Constitutional History of England, p. 306, note 1.)

The rule of the common law is stated by the Royal Commission appointed in England in 1868 to inquire and report on the laws of naturalization and allegiance as follows :

"All persons, of whatever parentage, born within the dominions and allegiance of the Crown, are, by the Common Law, natural-born British subjects. All persons, on the other hand, of whatever parentage, born beyond its dominions and out of its allegiance, were by the Common Law regarded as aliens." (Naturalization Commission Report, VII.)

As early as the 17th of Edward III (1343), doubts having arisen as to whether even the King's sons born without the realm could inherit, the question was brought before the Lords, who replied that the King's sons could inherit, wherever born, but that, with regard to the children of other persons, there were great difficulties in deciding the question.

The act of 25 Edward III (1350), Stat., 2, was accordingly passed on this subject ("*A statute for those that be born beyond sea*"), providing that all children inheritors "which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of the birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as other inheritors aforesaid in time to come; so always the mothers of such children do pass the sea by the license and wills of their husbands."

Mr. Horace Binney, who was no doubt the author of the learned article, published in 1854, in 2 American Law Register, p. 193, entitled, "*The alienigenæ of the United States*," which induced the passage by Congress of the act of February 10, 1855, was of opinion that the act of 25th Edward III introduced a new rule, and was not simply *declaratory* of the previous law, and that by the common-law principle which was in force in the United States, under the Consti-

tution, the children of American families born in *foreign countries* of native-born American fathers and mothers, fathers or mothers, were *aliens* of the United States. Mr. Binney said :

“The common-law principle of allegiance was the law of all the States at the time of the Revolution and at the adoption of the Constitution, and by that principle the citizens of the United States are, with the exceptions before mentioned, such only as are either *born* or *made* so, born *within the limits and under the jurisdiction of the United States*, or naturalized by the authority of law, either in one of the States before the adoption of the Constitution or since that time, by virtue of an act of Congress.”

It is to be observed that Sir Alexander Cockburn, late Lord Chief Justice of England, was of opinion, agreeing with Mr. Binney, that the statute of 25th Edward III established a new rule and was an enabling act. “The view that the act was only *declaratory* of the common law,” says Lord Cockburn, “is hardly consistent with its language, which is prospective, and refers only to children which ‘from henceforth shall be born ;’ and it has been pertinently observed, that if the statute had only been declaratory of the common law, the subsequent legislation on this subject would have been unnecessary.” (Cockburn on Nationality, p. 9.)

This seems to have been the opinion, also, of the Royal Commission of 1868, from the statement in their report of the persons deemed by the common law of England to be “natural-born” British subjects, which include those only who were born within the dominions and allegiance of the Crown.

The view of the great lawyer of Philadelphia upon this technical question of English law thus appears to be sustained by the opinions of these eminent English jurists.

The majority of the Royal Commission of 1868, among whom were such jurists and publicists as Sir Travers Twiss,

Sir Robert Phillimore, and Sir Roundell Palmer, advised the retention by Great Britain of the rule of the common law by which the child born in England of an alien parent is regarded as a British subject, but that provisions should be made for enabling children born within the dominions of the Crown of alien fathers to be registered during their minority as aliens, and permitting the child, if not so registered during his minority, to register himself as an alien before exercising or claiming any right or privilege as a British subject.

The Commissioners said that while the rule which impresses on persons born within the dominions of the Crown the character of British subjects was open to some objections, it had, on the other hand, solid advantages.

"It selects as the test a fact readily provable, and this, in questions of nationality and allegiance, is a point of material consequence. It prevents troublesome questions in cases where the father's nationality is uncertain, and *it has the effect of obliterating speedily and effectually disabilities of race*, the existence of which within any community is generally an evil, though to some extent a necessary evil. Lastly, we believe that of the children of foreign parents born within the dominions of the Crown a large majority, would, if they were called upon to choose, elect British nationality." (Naturalization Commission Report, VIII.)

By the law of England as to nationality of origin, all persons born in the dominions of the Crown, whether of British or foreign parents, with a few exceptions, including the children of foreign diplomatic agents in Great Britain, and all persons being the children or grandchildren of British parents, though born within the dominions of a foreign State, are to all intents and purposes British subjects.

The Naturalization Act of 33 Vict., ch. 14 (May 12, 1870), provides that "any person who by reason of his having been *born* within the dominions of Her Majesty is a *natural-*

*born subject*, but who also at the time of his birth became, under the laws of any foreign State, a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such persons shall *cease* to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject." (Copy of the Act, Foreign Relations of the U. S., 1870, p. 435; Law Reports, Statutes, vol. V, 1870, p. 166.)

A child born of an alien in England is a *natural-born British* subject, with the right to make such a declaration as the statute provides.

### Fourth.

*The declaration of the Amendment that all persons born in the United States and subject to the jurisdiction thereof are "citizens of the United States"—that is to say, natural-born citizens—must necessarily be construed in reference to the words "citizen of the United States" and "natural-born citizen of the United States," as used in the Constitution, which unquestionably referred to and were intended to be defined by reference to the common-law principle of allegiance and alienage in force in all the States at the adoption of the Constitution. The Amendment, therefore, by its legal construction and effect, is only declaratory of the rule that every person, whether of American or foreign parents, born within our territorial jurisdiction, is a natural-born citizen of the United States.*

I. The Amendment, conformably to the original Constitution, contemplates two sources of citizenship, *birth in the United States* and *naturalization by the United States*, and its general object is to make citizens and not to *unmake* them—not to *take away* the character of citizens where the law as it stood before would have conferred it. It manifestly was not intended to *recast* the law of original nationality on the lines of any foreign Code and *denationalize* persons invested with citizenship under any existing law in respect to our nationality of origin.

As has been said, it is universally agreed that to make a person of *domestic birth* a citizen is not naturalization, and cannot be brought within the exercise of the power to "naturalize." (Authorities *supra* ; 2 Story Const., 44.)

No exceptions are *expressed* to the general rule of native-born citizenship of the United States declared by the Article, that every person of *domestic birth* is a natural-born citizen of the United States, and if any exceptions exist, it is only

by *implication* from the phrase "subject to the jurisdiction thereof," which is curiously supposed on the other side to operate by way of *repugnancy* to the rule of the Article, so as to make it declare that a person of domestic birth is a citizen of the United States if his parents are citizens, and an alien if his parents are alien.

II. By the Constitution, article I, section 2, § 2, and section 3, § 3, Senators and Representatives were required to have been for several years citizens of the United States *before the United States existed, except as a Confederacy*, and article 2, section 1, § 4, speaks of a "natural-born citizen of the United States" and "a citizen of the United States, *at the time of the adoption of this Constitution*," recognizing the difference between a natural-born citizen and a citizen of the United States.

By article 1, section 8, § 4, Congress was empowered, by a uniform rule, to *make* citizens—to remove the political disabilities of *aliens*, and, of course, it was assumed that Congress would know who were citizens by birth and who were aliens by birth under the Constitution.

By article 4 of the Articles of the Confederation, in effect, the citizens of each State were entitled to all the privileges and immunities of the "free citizens" in the several States, and, under the article, the citizens of each State, by birth or naturalization, became, politically, citizens of the United States and were recognized as such by the Constitution, which required Representatives and Senators (even in the first Congress) under it to have been for many years *citizens* of the United States.

The effect of the corresponding provision of the Constitution (article 4, section 2), that "the citizens of each State shall be entitled to all privileges and immunities of *citizens in the several States*," in the first instance, was to bring within the fold of citizenship of the United States, and thus of each and every State, all persons who, at the time of the

adoption of the Constitution, were, by birth or naturalization, citizens of any of the States. (3 Story, Constitution, 674, '5, § 1500.)

The provision also secured the privileges and immunities of citizens in all the States to persons who were in the future citizens of the United States.

The Constitution thus assumed that persons are natural-born citizens or aliens of the United States, under and by the operation of a principle or rule of law in respect to nationality by birth or origin, recognized and adopted by it, and coeval with the Union.

III. Now, there can be no just doubt, both upon sound doctrine and authority, that, while the Constitution of 1789 contained no express definition of citizenship declaring who were natural-born citizens and who were aliens of the United States, it recognized and adopted as the law of that subject, under the Constitution, the common law or the principle of the common law of allegiance and alienage, by which birth on the soil of a country both creates the duties and confers the rights of citizenship; that allegiance and natural-born citizenship spring from the *place of birth*, and not from *descent* or the nationality of parents.

1. It is universally admitted that free persons born within either of the colonies before the Declaration of Independence were by the common law, in force in all the colonies, subjects of the King, and that by the Declaration, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be *subjects* and became *citizens* of the several States, except so far as some of them were disfranchised by the legislative power of the States or availed themselves of the right to adhere to the British Crown, and thus to continue British subjects. (McIlvain *vs.* Coxe's Lessee, 4 Cranch, 209; Inglis *vs.* Sailors' Snug Harbor, 3 Pet., 99; Shanks *vs.* Dupont, *Ib.*, 242.)



Agreeably to the decisions of this Court in the cases above cited, the term "citizen" as used in our jurisprudence is precisely analogous to "subject" in the common law, and the change of phrase entirely resulted from the change of government. The transfer of the sovereignty from one person to the collective body of the people effected no change in the law in respect to native allegiance and nationality. (*State vs. Manuel*, 4 Dev. & Batt., 26; *Ainslee vs. Martin*, 9 Mass., 458.)

Mr. Justice Story, in his opinion in the leading case of *Inglis vs. The Sailors' Snug Harbor* (3 Pet., 155), examined the doctrine of nationality at the common law and applied it to the question of the citizenship or alienage of Bishop Inglis, born in New York in 1776, as derived from his place of birth, which was the controlling matter. The learned judge said :

"The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject, and, *e converso*, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry, What constitutes allegiance, and who shall be said to be born within the allegiance of a particular sovereign; or, in other words, what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage? Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship—first, *birth locally within the dominions of the sovereign*; and secondly, *birth within the protection and obedience, or, in other words, within the ligeance of the sovereign*. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must, also, at his birth, derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*. (See *Calvin's Case*, 7 Co., 1;

*Doe vs. Jones*, 4 Term Rep., 300; 1 Bl. Comm.) There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince."

And in respect to the demandant the learned judge said:

"If he was born after the 4th of July, 1776, and before the 15th of September, 1776 (when the British took possession of New York), he was *born an American citizen*, whether his parents were at the time of his birth British subjects or American citizens. Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the Government, and owing a temporary allegiance thereto, are subjects by birth. If he was born after the 15th of September, 1776, and his parents did not elect to become members of the State of New York, but adhered to their native allegiance at the time of his birth, then he was born a British subject."

2. It is equally well known that after the Declaration of Independence and before the Constitution the common-law principle of allegiance continued to be the law of all the States, and as such governed the subject of *natural-born* citizenship and alienage, and that natural-born citizenship of the several States was *native-born* citizenship and nothing else.

The learned Assistant Vice-chancellor, in *Lynch vs. Clarke*, after showing that at the Declaration of Independence by the law of each and all of the thirteen States the common-

law principle was the recognized rule of citizenship and alienage, observed :

"This continued unchanged to the time when our National Constitution went into full operation. There is no evidence of any alteration of the rule in any of the States during the period that intervened ; and the references which will be made under another head show conclusively that there had been no intermediate change in their policy."

And, after referring to early State constitutions and statutes, he observed that—

"The universal understanding of the representatives of the people of the States in establishing their fundamental and statutory laws was that every person born within their territory was by that fact alone a citizen, and in some of the States the recognition of the doctrine is express."

3. The principle of the common law that allegiance and citizenship spring from the place of birth, and not from descent or parentage, passed to the United States under the Constitution, and there it has ever since remained.

The court in *Lynch vs. Clarke* forcibly observed :

"The only standard which then existed of a *natural-born citizen* was the rule of the common law, and no different standard has been adopted since. \* \* \* Moreover, the absence of any avowal or expression in the Constitution of a design to affect the existing law of the country on this subject is conclusive against the existence of such design. It is inconceivable that the representatives of the thirteen sovereign States, assembled in convention for the purpose of framing a confederation and union for national purposes, should have intended to subvert the long-established rule of law governing their constituents on a question of such great moment to them all, without solemnly providing for the change in the Constitution ; still more that they should have come to that conclusion without even once declaring their object."

(a.) Such was the opinion of Chancellor Kent, who followed the English law in dividing the people of the United States politically into *aliens* and *natives*: "(1) Natives are all persons born within the jurisdiction and allegiance of the United States," and "(2) an alien is a person born out of the jurisdiction and allegiance of the United States."

One of the exceptions referred to by the chancellor includes the children of public ministers abroad, who, as he says, owe not even a temporary allegiance to any foreign power. (2 Kent Com., 39, 50.)

And the learned chancellor states, in a note, his opinion that in the United States the right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual States, separately considered. The question is governed by the principle of the common law in respect to the allegiance of all persons born within the King's dominions, which "was the law of the colonies, and became the law of each and all of the States, when the Declaration of Independence was made, and continued so until the establishment of the Constitution of the United States, when the whole exclusive jurisdiction of this subject of citizenship passed to the United States, and the same principle has there remained."

Mr. Rawle was of the same opinion: "Every person born within the United States, its territories or districts, *whether the parents are citizens or aliens*, is a *natural-born* citizen." (Rawle's Views of the Constitution of the United States, 86.)

Chief Justice Marshall, speaking for the Court, in *Murray vs. Charming Betsey* (2 Cr., 64, 120), said:

"Whether a person *born* within the United States, or becoming a *citizen* according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide." (See also *The Santissima Trinidad*, 7 Wheat, 283, 257.)

The question assumed that birth in the United States conferred national citizenship.

(b.) In 1844 the case of *Lynch vs. Clarke*, to which reference has been made, was decided by the Court of Chancery of New York in an opinion of remarkable ability delivered by Assistant Vice-chancellor Sandford, holding that Julia Lynch, born in the city of New York, in 1819, of alien parents, during their temporary sojourn in New York, was a native-born citizen and not an alien of the United States, and capable of inheriting the real estate in controversy.

Her parents were British subjects, domiciled at the time of her birth in Ireland. They came to this country in 1815 as an experiment, without any settled intention of abandoning their native country or of making the United States their permanent abode. They never concluded to remain here permanently, and after trying the country returned home in 1819, taking their daughter with them, and she continued to reside in Ireland until she came to this country, after her father's death, with her uncle, Thomas Lynch, in 1834, when she was about fifteen years of age.

"Her right to inherit, as the heir of Thomas Lynch, must be tested by the state of allegiance existing at his death, when the descent was cast. It is evident, therefore, that the right depends upon her alienage or citizenship at the time of her departure from this country in her mother's arms, in the year 1819; for no act intervened between that time and the death of Thomas, which could alter her political state or condition."

The court entertained no doubt but that Julia Lynch by our law was a citizen of the United States when Thomas Lynch died.

Judge Sandford said :

"In my judgment, there is no room for doubt but that to a limited extent the common law (or the *principles* of the common law, as some prefer to express the doctrine) pre-

vails in the United States as a system of national jurisprudence. To what *extent* it is applicable I need not hazard an opinion, either in general terms or in particular instances, beyond the case in hand. But it seems to be a necessary consequence from the laws and jurisprudence of the colonies and of the United States under the Articles of Confederation ; that in a matter which, by the Union, has become a national subject, to be controlled by a principle coextensive with the United States ; in the absence of constitutional or congressional provision on the subject, it must be regulated by the *principles of the common law*, if they are pertinent and applicable."

The Solicitor General expresses his surprise that the Chancellor held that the portion of the sacred soil of New York in controversy *passed by descent from an alien to Julia Lynch*, not as a citizen of New York, not under any law of that State, but under a national law, a common law of the United States ; but we apprehend that the learned counsel has not read the case with extreme care.

At the front of the Chancellor's opinion is the express statement :

"The Revised Statutes of New York, re-enacting so much of the act 11 and 12 William III, chapter 6, provides that no person capable of inheriting under our statute regulating descents, *shall be precluded from such inheritance by reason of the alienism of the ancestor of such person.* \* This applies directly to the case, if Julia Lynch were a citizen when her uncle died."

So that the Chancellor of New York did not fail to observe the fact that her uncle was an alien, and that she claimed by inheritance from an alien.

Nor did the Chancellor hold that the question of her right to real estate in New York by descent was governed by a common law of the United States. He said expressly that the question was governed by the law of New York, which in this respect was the common law of England, that aliens cannot inherit land ; but he said that *there was no*

*State law which in express terms declared who were aliens or who were citizens, either in general, or for the purpose of inheriting land.* "No one," he said, "can dispute the power of this, or any other State in the Union, to regulate the subject of inheritance; but where they [the State legislatures] have omitted to legislate, and the common-law disability is left to operate against aliens, the right to inherit, when disputed on this ground, must be determined on some general principle or rule of law, *which ascertains who are aliens and who are citizens.*"

Miss Lynch could not be an "alien," in the sense of the State law, if she was a natural-born citizen of the United States, and that question depended on the law of the United States under the Constitution.

(c.) As we have seen, Mr. Binney was of the same opinion, and in the article published by him in February, 1854, in the *American Law Register*, already referred to, expressed his dissent from the intimation of Chancellor Kent, and held that the children of American citizens born abroad were, by the principle of the common law of allegiance, operative under the National Constitution, *aliens of the United States*. In the opinion of Mr. Binney, the statute of twenty-fifth Edward III was not declaratory of the common law, but was an enabling act, and nothing but a statute for the naturalization of such children could possibly save them from alienage under the Constitution and Government of the United States. ("The Alienigenæ of the United States," 2 Am. Law Register, 194.)

(d.) The view expressed by Mr. Binney was adopted by Congress in the passage of the act of February 10, 1855 (10 Stats., 604), entitled "*An act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof,*" which provides that "persons heretofore born, or hereafter to be born, *out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of*

*their birth* citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.*"

This act discloses the fact that Congress understood that the common-law principle of allegiance, by which birth on the soil of the country constituted the test of original citizenship, was the law of the United States, and that all persons, of whatever parentage, born "*out of the limits and jurisdiction of the United States*" were aliens in respect to the United States unless made citizens by an act of naturalization.

(e.) In fact, the language and requirements of the entire body of the legislation of Congress under the power to provide a uniform rule of naturalization, having reference, as they do, only to persons *born abroad* and having no reference to any one *born here*, constitute a declaration of opinion by the legislative branch of the Government that the common-law principle of allegiance and alienage is part and parcel of the public municipal law of the United States.

(f.) Mr. Justice Curtis, in *Dred Scott vs. Sandford*, entertained no doubt that the Constitution recognized as a fundamental rule of natural-born citizenship of the United States what he called that "great principle of public law, that *allegiance and citizenship spring from the place of birth*;" that "*birth on the soil of a country both creates the duties and confers the rights of citizenship*;" that the term naturalization was interpretable only in reference to its meaning as fixed in the common law; that persons born within the several States were, according to the great doctrine of the common law, by virtue of the fact of their having been so born, citizens of the United States, and that there was "a native-born citizenship of the United States distinct from a native-born



citizenship of the several States." (18 How., 581, 586, 578, 577, 584.)

(g.) In 1862, as we have seen, the Attorney General declared, in his memorable opinion to the Secretary of the Treasury, that by the rule of our national law birth on the soil of the country and allegiance to the United States went together, and that all free persons, of whatever parentage, born within the limits and jurisdiction of the United States, were born in the allegiance and were natural-born citizens of the United States.

Mr. Bates regarded the judgment in the *Dred Scott Case* as limited in law, as it is, in fact, limited on the face of the record, to the plea in abatement, and he said :

"Taking the plea, then, strictly as it is written, the persons who are excluded by this judgment from being citizens of Missouri must be *negroes*, not mulattoes nor mestizos nor quadroons. They must be of *African* descent, not *Asiatic*, even though they come of the blackest Malays in south-eastern Asia. They must have had *ancestors* (yet that may be doubtful if born in slavery, of putative parents, who were slaves, and, being slaves, incapable of contracting matrimony; and therefore every child must needs be a bastard, and so by the common law *nullius filius*, and incapable of ancestors). His ancestors, if he had any, must have been of *pure* African blood, not mixed with the tawny Moor of Morocco or the dusky Arab of the desert, both of whom had their origin in Asia. They must have been *brought* to this country, not come voluntarily; and *sold*, not kept by the importer for his own use, nor given to his friends."

The Attorney General deemed whatever was said respecting the legal merits of the case and any supposed legal disability resulting from the fact of color, "though entitled to all the respect which is due to the learned and upright sources from which the opinions come," as of no authority as a judicial decision.

Nor was the particular view expressed by Mr. Justice Curtis in the *Dred Scott Case*, that the States could so legislate as to determine what persons born within their respective limits should acquire by birth citizenship of the United States, accepted by the Attorney General as based upon a sound construction of the Constitution, although the view of Mr. Justice Curtis is not expressly referred to in his opinion.

The opinion of Attorney General Bates is printed in the Appendix to the Report of the Royal Commission of 1868 as an authoritative exposition of the law of the United States as to original Citizenship under the Constitution. (Report of Naturalization Commission, Appendix, p. 87. See also public document entitled, "Opinions of the Principal Officers of the Executive Department and other Papers relating to Expatriation, Naturalization, and Change of Allegiance," 1873, for the Report of the British Commission of 1868, p. 64.)

IV. It follows from all this that the citizenship clause of the Amendment, construed, as it must be, with reference to the law of natural-born citizenship under the original Constitution, as determined by judicial decisions and juridical opinions before the article was framed and known by its framers, is merely declaratory of the fundamental principle of that law, coeval with the Union, that allegiance and citizenship spring from and are dictated by the place of birth and not descent, and excepts no native-born person from the right of citizenship on account of the alienage or political condition of his parents.

The foundation of the law of national citizenship under the Constitution was discussed by Mr. Justice Swayne in the well-known opinion delivered by him, in 1866, in the case of *United States vs. Rhodes*, in the Circuit Court of the United States for the District of Kentucky (1 Abb. U. S.

Rep., 38). The case arose under the Civil Rights Act of April 9, 1866, and it was held by the Circuit Court that the term "citizen," as understood in our law, is precisely analogous to the term "subject" in the common law; and as in England all persons born in the allegiance of the King are natural-born subjects, so "all persons born in the allegiance of the United States are natural-born citizens."

Mr. Justice Swayne said:

"Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are, in theory, born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property and not persons (2 Kent Com., 3d ed., 1; Calvin's Case, 7 Coke, 1; 1 Black. Com., 366; *Lynch vs. Clark*, 1 Sandf. Ch. R., 139). The common law has made no distinction on account of race or color. None is now made in England, nor in any other Christian country of Europe. \* \* \* We cannot deny the assent of our judgment to the soundness of the proposition, that the emancipation of a native-born slave by removing the disability of slavery made him a citizen."

### Fifth.

*There is no warrant in any of the terms of the Fourteenth Amendment for imputing to it an intention to base the rule in respect to the citizenship of persons "born" in this country upon personal considerations—upon the nationality of the parents or fathers of such native-born persons—and to exclude or except from natural-born citizenship the children "born" in the United States of foreign parents who are not exempted by positive international law from the territorial jurisdiction of the United States.*

I. Citizenship or Nationality is the status of a person as citizen or subject in relation to a particular State, and it is either *natural* or *acquired*—natural when it results from birth, *acquired* when a person is made a citizen or subject by a State to which he did not originally belong—and no person *born* in this country, and within the allegiance of the United States, can be made a citizen by naturalization under the Constitution. (Mr. Binney, "The Alienigenæ of the United States," 2 Am. Law Register, 194.)

It is understood by all publicists, as we have said, that there are two wide principles which form the basis of the municipal laws of States in respect to natural citizenship, and by which States are governed in claiming or rejecting persons as their members by birth. One of these bases its conclusion upon the *place of birth*, the fact of birth within the *territorial jurisdiction*, irrespective of parentage. The other proceeds upon *personal considerations*, upon the nationality of the parents, irrespective of the place of birth (Walker, Science of Int. Law, 220.)

II. The Fourteenth Amendment declares the rule of natural, original, or "natural-born" citizenship of the

United States, and it excludes, by the necessary import of its terms, no native-born "persons" who, at the time of their birth, are not *exempted* by positive international law from the operation of the territorial sovereignty of the United States.

There are no words in the Amendment countenancing the idea that it was intended to declare in respect to native-born persons that their character as natural-born citizens or aliens of the United States, should depend upon *personal considerations* founded on the nationality of their fathers, and to reject native-born persons as citizens whose fathers are aliens while accepting as citizens persons of the same class whose fathers are citizens.

Manifestly, if it had been intended by the Amendment to *recast* our law of native nationality by introducing the principle of *descent*, however indirectly, such an intention would have been avowed or expressed in some manner in the Article.

It must be assumed that its framers knew the limitation upon the power of Congress in respect to the naturalization of persons of *domestic birth*, and that if there had been a purpose to except such persons, not exempted from local jurisdiction, from natural-born citizenship, some provision would have been made for removing their disabilities, resulting not from foreign birth, but from *birth on the soil of the United States*.

III. It will be seen also that every *word* of the Article absolutely excludes the legal possibility of any conclusion that there was a purpose to change or modify in any respect the original principle of our law by which our nationality was always acquirable by the mere fact of being born in the territory and under the protection of the United States, whether the father of the native, if a foreigner, was domiciled or settled or merely temporarily sojourning in the country.

The provision operates upon all "persons" as *persons*, and not as the children of citizens or with any reference to their fathers or the condition of their fathers, and declares that they—that is to say, "all persons"—if "*born*" in the United States and subject to the jurisdiction thereof, are "citizens of the United States and of the State wherein they reside."

The *sole* test declared is the fact of their having been born in the territory and subject to the jurisdiction of the United States, and *nothing else* can be added to it.

No other persons are citizens, under the Amendment, except persons *naturalized* in and subject to the jurisdiction of the United States, and they are persons of *foreign* birth who *acquired* citizenship under the Constitution and laws of the United States.

IV. The term "jurisdiction" of the United States is manifestly used with reference to the sovereign power of the United States within the limits of its territory, by which it possesses, as an independent State, the right to control by its laws all persons, property, acts, and events therein, including the right to impress the character of citizens upon "all persons," of whatever parentage, born therein, who are not exempted by positive international law from the operation of the territorial sovereignty of the Government.

The provision is that all persons born *in the United States*, meaning, of course, the *territory* of the United States, and "subject to the jurisdiction thereof," are natural-born citizens. The jurisdiction referred to is, therefore, the jurisdiction of the United States as a sovereign State in relation to its *territory*, and persons within it, the extent of which and the exceptions to which are defined under a distinct branch or head of public international law.

The words "subject to the jurisdiction thereof," in fact, create no *real* exceptions to the rule of national citizenship. They were intended to recognize the settled principles of the law of nations in respect to "sovereignty in relation to the

territory of the State," by which certain persons are exempted from that sovereignty, and "are said to be in law *outside of the State in which they are*," and not to include them in the operation of the Amendment.

Mr. Hall has vividly described the international-law "doctrine of extritoriality" recognized and applied by the words "subject to the jurisdiction thereof" in the Amendment.

"The relation," he says, "created by these immunities is usually indicated by the metaphorical term extritoriality, the persons and things in enjoyment of them being regarded *as detached portions of the State to which they belong, moving about on the surface of foreign territory and remaining separate from it*. The term is picturesque. It brings vividly before the mind one aspect, at least, of the relation in which an exempted person or thing stands to a foreign State; but it may be doubted whether its picturesqueness has not enabled it to seize too strongly upon the imagination. Extritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law *outside of the State in which they are*." (Hall, International Law, ch. IV, § 48.)

The children born here of foreign parents, who are regarded by the metaphor of the law of nations as attached to the territory of a foreign State, "moving about on the surface" of the territory of the United States and "remaining separate from it," are not born "subject to the jurisdiction" of the United States, but are born "subject to the jurisdiction" of such floating foreign State, and are thus excepted by the Amendment from its operation or, more strictly, are not included in the Article.

The so-called exceptions contemplated and provided for by the Amendment to the declared rule of nationality serve only to illustrate and confirm the rule that citizenship is established by the fact of birth in the country. The exceptions are persons born of alien parents, who, by the

positive law of nations, are regarded as having been born *outside* of the territory of the United States, and *beyond* its territorial jurisdiction, and who are not, therefore, persons born *in* the United States, and "subject to the jurisdiction thereof," within the meaning of the Amendment.

V. The children born here of alien parents are *not* born "subject to the jurisdiction" of their *parents'* country, although that country may regard such persons as its lawful citizens or subjects, and would treat them as such, if they themselves should return to and abide in their parents' country, and claim to be and act as subjects or citizens thereof.

The Government of the *parents' country* had and could have no "*jurisdiction*" over such native-born persons *in the territory of the United States*. Its laws could not operate beyond its own territory, and could not affect persons born in the United States, or determine the *status* or condition of such persons, as citizens or aliens, in the United States. The *status* of such native-born persons, as citizens or aliens, in the territory of the United States, could be determined only by the law of the United States, which is the *supreme and exclusive law* within and for that territory.



### Sixth.

*The United States, by its People, had the undoubted jurisdiction, power, and right to impress upon the children born of the subjects or citizens of another State in the territories of the United States, the character and quality of citizens of the United States, whether the foreign parents of such children were settled or merely temporarily sojourning in the country at the time of the birth of such children in the United States.*

I. This follows from the doctrine of the independence of every State, from which flow the rights of sovereignty, which include the right to determine the condition of persons, as citizens or aliens, within the territory of the State; so that primarily it is a question for the municipal law of a nation to determine whether a given individual is to be considered its citizen or subject, and in respect to all persons as to whose nationality a difference of legal theory can exist, international law has made no choice, and it is left open to States to act as they like (Hall, *International Law*, chap. V, § 66). As to persons born of the subjects of one State within the territory of another, their adoption by the State within whose territory they are born as its citizens or subjects, is consistent with the due recognition of the independence of the State to which their parents may belong, and it is left open, therefore, to every State to act as it likes in respect to such native-born persons. It is well understood, as stated by Mr. Hall, that until the establishment of the Code Napoleon, in 1808, no nation regarded the children of foreigners born upon its soil as aliens.

No independent State is obliged to adopt as its policy the rule of determining the nationality of persons born within its territory, by descent, or to allow the municipal law of a foreign State, in respect to the nationality of the children of its subjects born abroad, to take the place of its own customary law, within its own jurisdiction, by which such

children, born on its soil, are regarded as its natural-born citizens.

In the view of the customary law of England and the United States, the child's first protector is the Government under which it was born, and it owes an original, natural, and legal obligation to the country of its birth, and not to the country of its father's birth, although by its laws the latter country may deem the child to be one of its own citizens or subjects.

II. Every nation, therefore, has the undoubted right, as incidental to its right of jurisdiction or right of empire, to establish within and for its own territory its own law of natural or original allegiance and alienage, and all persons found within the limits of that territory are legitimately bound by that law, and by what it ordains, in respect to the natural-born citizenship of persons who may be born within the territory of the nation.

No foreign law on that subject can have any operation within the limits of the nation of birth without its consent, and no law other than that of the country of birth, therefore, can determine the political condition, as natural-born citizens or aliens, of native persons within the limits of its territory.

And the State has the undoubted right to apply its law of nationality to the children born of persons temporarily in its territory, as well as to the children of those who may be domiciled or settled there, and in neither case can the law of the parents' country in respect to the citizenship of such children have effect within the country of their birth without its consent.

As has been said, the power of a nation to so legislate as to impress its national character upon all persons, of whatever parentage, *found to have been born within its territory*, flows directly and necessarily from its right of empire, its right of exclusive and absolute civil and criminal legislation within its territorial limits, or, in other words, its right of sovereignty within those limits.

### Seventh.

*According to the settled principles of the law of nations, agreeably to which the terms, "subject to the jurisdiction" of the United States, in the Fourteenth Amendment, must be interpreted, a child born in the territory of the United States of alien parents, not exempted by the law of nations from the territorial sovereignty of the United States, and whether domiciled or settled, or merely temporarily sojourning therein, is born therein "subject to the jurisdiction" of the United States, and of no other power. The "jurisdiction" of the United States is the sovereignty of the United States within and over its own domains, or its territorial sovereignty, as contemplated by the law of nations.*

I. As the Amendment deals with a matter appertaining to law, it is to juridical science that we are to look for the interpretation of its terms; and since it deals with the "jurisdiction" of the United States as a Sovereign State in relation to persons born in the territory thereof, we are to inquire the meaning and application of that term as it is used in international law, and the limits of the "jurisdiction" of a Sovereign State according to the principles of that law.

Professor Mountague Bernard concisely defines a Sovereign State to be "a community or number of persons permanently organized under a Sovereign Government of their own, and by a Sovereign Government we mean a Government, however constituted, which exercises the power of making and enforcing law within a community and is not itself subject to any superior Government. These two factors—the one positive, the other negative—compose the notion of sovereignty and are essential to it." (Bernard, *Neutrality of Great Britain during the American Civil War.*)

Mr. Maine, in his *Lectures on International Law*, dwells

upon the fact that sovereignty was not always "*territorial*," not always associated with a definite portion of the earth's soil, the fundamental conception being that the territory belonged to the tribe, and the sovereign is sovereign over the tribe. "At this day sovereignty is always associated with a *definite portion of the earth's surface*." (Maine, Lectures on International Law, lect. III.)

In his principal works, Mr. Maine shows that during a large part of what is termed modern history, no such conception was entertained as that of "territorial sovereignty." (Ancient Law, p. 99; Early History of Institutions, p. 76.)

And without that conception—if sovereignty had not become *territorial*—as Mr. Maine states, "three parts of the Grotian theory would have been incapable of application."

"The fact is," says that great jurist, "that the feudalization of Europe had to be completed before it was possible that sovereignty could be associated with a definite portion of the soil."

At the present time, the normal relations of civilized States are all deducible from the simple conception of "*State sovereignty*."

The "jurisdiction" of a Sovereign State, in its juridical sense, is defined nowhere more clearly and completely than in the great opinion delivered for this Court by Chief Justice Marshall in the leading case of *The Schooner Exchange vs. McFadden* (7 Cranch, 136).

It is there described, agreeably to the meaning of the term in the law of nations, as the full and complete power of a nation, as a sovereign, "*within its own territories*."

"The *jurisdiction* of the nation within its own *territory* is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an *external source*, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent

in that power which could impose such restriction. All exceptions, therefore, to the *full and complete power of a nation within its own territories*, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

And the Chief Justice remarked that "the *jurisdiction* of courts is a branch of *that* which is possessed by the nation as an independent sovereign power."

"All sovereigns," he observed, "have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete *jurisdiction* within their respective territories which sovereignty confers."

This has given rise to a class of cases "in which every sovereign is understood to waive the exercise of a part of that complete, exclusive *territorial jurisdiction*, which has been stated to be the attribute of every nation."

One of these cases is the "immunity which all civilized nations allow to foreign ministers." And the Chief Justice said:

"Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be *extraterritorial*, and, therefore, in point of law, not within the *jurisdiction* of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of *extraterritoriality* could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it."

Writers on the public law of nations treat this subject under the title of the "Right of Jurisdiction," or "Sovereignty in Relation to the Territory of the State," "Territorial Sovereignty," or "Territorial Jurisdiction." (1 Philimore, Int. Law, ch. XVIII, XIX; Hall, Int. Law, chap. IV; Twiss, Int. Law, chap. IX; Wheaton Int. Law, part II, chap 2.)

"Every nation," says Mr. Wheaton, "possesses exclusive sovereignty and *jurisdiction* throughout the full extent of its *territory*." (Wheaton, International Law, part II, chap. II.)

Chancellor Kent says:

"No nation has any *jurisdiction* at sea, except it be over the persons of its own subjects, in its own public and private vessels, and so far as territorial jurisdiction may be considered or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. This *jurisdiction* is confined to the ship, and no one has a right to prohibit the approach of another at sea or to draw around her a line of *territorial jurisdiction*, within which no other is at liberty to intrude." (1 Kent, Commentaries, 26.)

The "jurisdiction" of a State in relation to its territory was discussed with great learning, it will be remembered, by the judges of England in the celebrated case of *The Franconia, Queen vs. Keyn* (L. R., 2 Exch. Div., 63), which was followed by the "Territorial Waters Jurisdiction Act" of 41 and 42 Vict., c. 73.

"The Empire united to the domain," says Vattel, "establishes the *jurisdiction* of the Nation within its territory." (Droits des Gens, B. 11, § 84.)

Thus it is that the "jurisdiction" of a State is the Empire of the Nation within its own domain, incidental to which is its Right of Civil and Criminal Legislation in respect of all property and persons, all acts and events, within that domain. Sir Travers Twiss, in the chapter of his work, entitled "*Right of Jurisdiction*," states the doctrine thus:

"The Empire of a Nation within its own territory is of Natural Right exclusive and absolute. All exceptions, therefore, to the free exercise of the Right of Empire by a Nation

within its own territory must be derived from the consent of the Nation itself.

"The Right of Civil and Criminal Legislation in respect to all property and persons within the territory of a Nation is an incident of the Right of Empire." (Twiss, Law of Nations, "Right of Jurisdiction," ch. IX.)

The "jurisdiction" of an independent Sovereign State, therefore, is its absolute and exclusive *territorial sovereignty* over all persons found on its land and waters, and over all acts, events, conduct, and contracts, and over all possessions, real and personal, within the State territory. And this is the sense in which the term must be understood to be employed in the Amendment.

II. The exceptions introduced by the international doctrine of *extritoriality* to the full and complete "*jurisdiction*" of a nation within its own territories are stated by Mr. Walker in his recent work to be chiefly these:

(a.) Foreign sovereigns traveling within the territory in their proper character, together with their personal attendants.

(b.) Ambassadors and other ministers of legations representing foreign sovereigns within the States to which they are accredited, together with their attendant suites.

(c.) Military forces of a foreign State passing in their proper character through the territory, and naval forces of foreign States—*i. e.*, men of war, with their boats and crews—lying within territorial waters. (Walker, Science of International Law, p. 221.)

Mr. Webster, in his celebrated correspondence with Lord Ashburton, in 1842, on the *Creole Case*, maintained also that "the *jurisdiction* and laws of a nation accompany her ships,

not only over the high seas, but into ports and harbors, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and to the extent of the exercise of this jurisdiction they are considered as parts of the *territory* of the nation itself." (*"Maritime Rights,"* Works of Webster, vol. 6.)

In the cases of all exceptions, real or alleged, however, to the *exclusiveness* of the territorial jurisdiction, the exemption is at once civil and criminal, and the sovereign abnegates *in toto* his right of empire or sovereignty so long as his toleration is compatible with self-protection; but he does not permit the exercise in his confines by any foreign ruler of the appropriate functions of sovereignty.

"The inviolability of the person of an ambassador entails, as a necessary incident, his entire exemption from the territorial jurisdiction. According to this fiction (extraterritoriality) the public minister, although *de facto* resident in a foreign country, is regarded as *de jure* resident within the territory of the nation which he represents, and he continues to be subject to the *laws* of his own country in all matters which concern his personal *status* and property." (Twiss, Law of Nations, § 200.)

Dr. Woolsey says that an ambassador is conceived of as bringing his native laws with him out of his native territory. (International Law, § 64.)

It is well settled, for example, that it is only by the immunity of an ambassador, under the positive law of nations, from the territorial "jurisdiction" of the State to which he is accredited, that children born to him there do not become citizens of the State, if all persons born within its territory are declared by its laws to be so. (Hall, Int. Law, § 50.)

As stated by Mr. Hall, the ambassador is conceived by the law of nations as being "*outside the jurisdiction*" of the



State to which he is accredited, and "thus children born to him within that State are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so."

The children born within a State to all aliens who are not exempted by the public law from its territorial sovereignty, whether the residence of their parents within the territory is PERMANENT OR TEMPORARY, are born under and subject to the operation of the territorial sovereignty of the State, and become its citizens or subjects if declared to be so by its laws. They are born "*subject to the jurisdiction*" of the State of their nativity.

III. Agreeably to these elementary principles of the law of nations, by which the Amendment is to be interpreted, all persons born in the United States under and subject to the territorial sovereignty thereof, are born subject to the "*jurisdiction*" of the United States within the meaning of the Article. It follows, therefore, that all children born in the United States of alien parents, who are not exempted by the positive law of nations from the territorial sovereignty of the United States, are born "*subject to the jurisdiction thereof*," within the meaning of the Amendment, and are declared to be natural-born citizens of the United States—that is to say, persons who owe by birth permanent allegiance to the United States. Such persons are born in the territory of the United States, and within the allegiance of the United States, and are, therefore, natural-born citizens of the United States.

### **Eighth.**

*It follows from the preceding argument that all persons born in the United States of alien parents, temporarily sojourning in the country, without immunity from the territorial sovereignty of the United States, under the doctrine of exterritoriality, are "subject to the jurisdiction" of the United States, agreeably to the intended meaning of the Amendment, and are included in and embraced by the Amendment, and are not excluded or excepted from its operation.*

I. As has been shown, there can be no just doubt that the Amendment was intended to be based upon the doctrine derived from the common law, that the character of a natural-born citizen is incidental to birth only, whatever was the situation or predicament of the parents, as settled or merely temporarily sojourning in the country; the being born within the territory of the State constituting a *natural-born citizen*, the being born out the State territory constituting an *alien*. (*Duroure vs. Jones*, 4 Term R., 308.)

The citizenship clause of the Article, agreeably to the principles of law applicable to its interpretation, must be construed with reference to this doctrine of the common law, which, as understood by the framers of the Amendment, originally governed the matter of citizenship and alienage in this country, and with reference to which it was definitely intended that the terms of the Article should be interpreted.

There was no intention to change the established rule under the common law in respect to the effect of birth only within the dominions of the State as determining the original political status of the native-born person.

That rule is illustrated by the case of Mrs. Preto and her daughter, which was the subject of the opinion given by

Mr. Bates to Mr. Seward, in 1862, already referred to (10 Ops. Att'ys Gen'l, 321). The daughter was born in Washington of a Spanish subject, who, while only temporarily residing here, married an American lady. The daughter was a child only three years old when the family went to Spain. It was held that Miss Preto became a citizen of the United States by birth, although by the law of Spain she was undoubtedly a Spanish subject, and that the removal to Spain and residence of the family in that country constituted no evidence of an attempt on her part to cast off her native allegiance to the United States, and adopt Spanish allegiance. She always claimed, as stated, to be an American citizen. The Attorney General said that he did not question the right of voluntary expatriation and the choice of a new allegiance, which, of course, had nothing to do with the question of the original citizenship by birth of the daughter of Mr. Preto, which was the fundamental question in the case. It was not doubted that the citizen by birth or naturalization could renounce or abjure the citizenship and allegiance thus acquired, and lose or forfeit the right to receive protection from the Government; but that was another and different question from the question of the original citizenship of Miss Preto.

II. A child born in the United States of an alien father, temporarily sojourning in the United States, without immunity from the territorial sovereignty of the United States, under the international doctrine of extraterritoriality, is subject, at the time of his birth, to the "jurisdiction" of the United States, agreeably to the intended meaning of that term, and is within the provision of the Amendment, and is not excluded or excepted from its operation.

Specifically, it was intended by the framers of the Amendment *not* to change by that language the general principle in respect to birth, under whatever circumstances, in the territory of the United States, as the test of original citizen-

ship of the United States. The birth may be *casual*, or it may be *otherwise*, but its primary and necessary effect is the same under the Constitution.

The "jurisdiction" of the United States referred to in the Article, as we have said, is the jurisdiction which a State possesses, in the contemplation of the public law of nations, within certain limits, by virtue of its territorial *sovereignty*, and which is exercisable over *all* persons, without reference to their condition or parentage or the nationality of their parents, found anywhere upon land and waters within its territory.

The new-born infant of a transient alien is, at and from the moment of its birth, as completely "subject to the jurisdiction" of the United States, in its territory, in the sense of the public law and the Amendment, as any other human being born in the dominions of the United States, and is impressed at once, by the Amendment, with the national character. It is not excepted from the jurisdiction of the United States, as exercised by any Department of its Government, executive, legislative, or judicial, by reason of any of its conditions growing out of its parentage, or the relations of its parents to the country or the Government. The infant is, in fact, a *subject* of the United States at the instant of birth, and takes its nationality in the United States from and under the Amendment as naturally as it breathes the air of the country.

Sir Travers Twiss says:

"Huberus (*De Conflictu Legum*) has propounded three maxims which Mr. Justice Story, Mr. Wheaton, and M. Faelix equally approve as being conformable to the practice of nations. The first is that the laws of every empire have force only within the limits of its own government and bind all who are *subjects* thereof, but not beyond those limits. The second is that *all* persons who are *found within the limits of a government, whether their residence is permanent or temporary*, are to be deemed *SUBJECTS THEREOF*. The third is that the rulers of every empire from comity admit that

the laws of every country in force within its own territorial jurisdiction ought to have the same effect everywhere, so far as they do not prejudice the power or rights of other governments or of their citizens." (Twiss, International Law, § 153.)

Story, Conflict of Laws, ch. 2, §§ 17-20, 29-31.

Wheaton, International Law, pt. II, ch. 11, p. 115.

Mr. Justice Story, in his *Conflict of Laws*, says:

"The first and most general maxim or proposition is that every nation possesses an exclusive sovereignty and *jurisdiction* within its own territory. The direct consequence of this rule is that the laws of every State affect and bind directly all property within its territory and *all persons* who are residents within it, whether natural-born subjects or aliens, and all contracts made and acts done within it.

"Another maxim or proposition is that no State can by its laws directly affect or bind property out of its territory or bind *persons not resident therein, whether they are natural-born subjects or others.*"

He then approves the maxims of *Huberus*, the second of which is that all persons who are *found* within the limits of a government, whether their residence is permanent or temporary, are to be deemed *subjects* thereof. The maxim of *Huberus* is also adopted by Mr. Wheaton as expressing the rule of international law.

There can be no doubt that the framers of the Amendment were familiar with these universally recognized principles of public law, and selected the language of the Article with direct reference to them, and intended that the language of the Article should be interpreted by them.

III. Unquestionably, the child born here of a transient alien becomes from the moment it is born subject to the authority and protection of the laws of the United States, in the exercise of its territorial sovereignty, and subject also

to the right of national protection by the United States, as a citizen of the United States, against an aggression or injury by any foreign power, and such a right would undoubtedly be exercised by the United States, as a Government, in any case in which its intervention might become necessary for the enforcement of the just international rights of such a child against the government of the country of the father, as well as any other foreign government.

The situation of the *parents*, in relation to the territory of the United States, has nothing whatever to do, in fact, with the subjection of the native child, at the time of its birth, to the "*jurisdiction*" of the United States, in the contemplated sense of the Amendment.

The rights of sovereignty give *jurisdiction* over ALL persons born within the territories of a State, without any reference or regard to the character or circumstances of the *residence* of their parents, as permanent or temporary, within the limits of the State, and this is equally true whether the parents are *citizens* or *aliens* of the State.

IV. It follows from these principles that the native-born child of an alien, whether the residence of the foreign parents in the United States, at the time of his birth, was transient or domiciliary, was not subject, at the time of his birth, in the United States, to the "*jurisdiction*" of the parents' country or any other foreign country, although the child may be deemed by the laws of the parents' country to be a natural-born subject or citizen of that country, and would be treated as such by the parents' country within its territorial limits.

Mr. Justice Story, speaking of the binding force of the laws of a country upon its citizens, states:

"Whatever may be the intrinsic or obligatory force of such laws upon such persons if they should *return* to their native country, *they can have none in other nations where they reside*. Such laws may give rise to personal relations be-

tween the sovereign and subject, *to be enforced in its own domains*, but they do not rightfully extend to other nations, '*statuta suo clauduntur territorio nec ultra territorium disponunt*,' nor, indeed, is there, strictly speaking, any difference in this respect, whether such laws concern the persons or concern the property of native subjects. \* \* \* When, therefore, we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them *when they return within its own territorial jurisdiction*, and not its rights to compel or require obedience to such laws on the part of other nations *within their own territorial sovereignty*. On the contrary, every nation has an *exclusive right* to regulate persons and things within its own territory according to its *own sovereign will and public policy*." (Conflict of Laws, § 22.)

Sir Travers Twiss shows that National Sovereignty is properly Territorial, and that it would be "inconsistent with the absolute and exclusive character of Territorial Empire if the laws of a Nation could bind persons within the territory of another Nation, and so control the operation of the laws of the latter Nation within its own territory" (Int. Law, § 151). And he approves the observation of Rodenburg that "*no sovereign power can of right set law beyond the limits of its territory*." (Rodenburg, De Statutis, tit. 1, c. 3, § 1.)

The native-born child of an alien, though he may be, in the view of the municipal laws of his parents' country, a natural-born subject of that country, can be subjected to the operation of those laws only *within the territorial jurisdiction of that country*. Such native-born person, at the time of his birth, is subject only to the jurisdiction of the United States.

These principles were recognized by Mr. Fish, as Secretary of State, in the able opinion given by him to President Grant on the general subject of nationality and allegiance in 1873.

"No sovereignty," said Mr. Fish, "can extend its *jurisdiction beyond its own territorial limits*, so as to relieve those born under and subject to *another jurisdiction* from their obligations or duties thereto, nor can the municipal laws of one State interfere with the duties or obligations which its citizens incur while voluntarily resident in such foreign State, and without the jurisdiction of their own country. \* \* \*

*The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to that country which do not attach to the father.* The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and *entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.* Such children are born to a double character. The citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen are concerned, and *within the jurisdiction of that country*; but the child, from the circumstances of his birth, *may acquire rights and owes another fealty besides that which attaches to the father.*" (Opinions of the Principal Officers of the Executive Departments, Expatriation, &c., 1873, p. 17.)

V. The fact is that the authority possessed by a State over its citizens or subjects resulting from the *personal relation* based on allegiance existing between the State and such persons, is no "*jurisdiction*" at all, to which such persons are "*subject*," outside of the State territory and while they remain within the dominions of another power.

Such authority cannot be enforced by the State against persons claimed to be its citizens except by the sanctions of its municipal laws, and consequently in places within its own territorial sovereignty.

Within the territorial sovereignty and jurisdiction of a



foreign State, no authority on the part of the State over its citizens, as such, to which such persons are "subject," or can be subjected, has any existence. (Hall, International Law, § 73; Case of Carl Vogt, Extradition, 14 Opinions Att'ys Gen'l, 281, 283, 285.)

VI. It is, of course, unnecessary in this connection to consider whether the American citizenship of a person born in the United States of an alien father may be effectually lost, and, if so, by what acts on the part of the citizen it may be so lost. Whether he may renounce or abjure his American citizenship and the rights and duties thereof, and completely divest himself of them, and by what means that may be accomplished, are obviously inquiries not involved in the consideration of the present question.

The right of expatriation is not denied by the political department of the Government of the United States, but it was said by Mr. Fish, as Secretary of State, that "in the absence of legislative declaration of what constitutes 'expatriation' and of the mode whereby it is to be effected, the experience of the Government has made manifest that while expatriation is declared to be a right which may be converted into a fact, it is, like other facts, to be established in each individual case by evidence peculiar to itself, and each case to be decided on its own merits." (*Ibid.*, p. 14.)

By the statute law of the United States persons born "out of the limits and jurisdiction of the United States," whose fathers were, at the time of their birth, citizens of the United States, are declared to be citizens, with the proviso that the "right of citizenship shall not descend to persons whose fathers never resided in the United States;" but it was never supposed that such persons, at the time of their birth, were "subject to the jurisdiction" of the United States, and were not "subject to the jurisdiction" of the foreign country of their birth and residence, or were exempt from the obligations or duties incident to their status as natural-born sub-

jects or citizens of such foreign country, if declared to be so by its laws.

As said by Mr. Fish, in the opinion above cited, every independent State may "endow with the rights and privileges of its citizenship persons residing in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the State thus conferring its citizenship; but no sovereignty can extend its *jurisdiction* beyond its own territorial limits, so as to relieve those born under and subject to another jurisdiction from their obligations or duties thereto." (Opinions, Expatriation, &c., *supra*, p. 17.)

### Ninth.

*It is manifest, therefore, that the question of the natural-born citizenship, or alienage, of any persons born in the United States of alien fathers, cannot be made to depend, under the Fourteenth Amendment, upon the "domicile" of their parents at the time of their birth in the United States.*

I. The "*domicile*" of the parents of a person born in the United States, whether the parents are aliens or citizens, has nothing whatever to do with the "*jurisdiction*" of the United States over such native-born person, or with his being "*subject to the jurisdiction*" of the United States, and he is completely and in a full sense subject to the jurisdiction of the United States, at the time of his birth, whether his parents, being *citizens or aliens*, are at that time domiciled in this or in a foreign country.

If the native-born child of an alien, domiciled in his own country, is not a natural-born citizen of the United States, the native-born child of a *citizen* who is domiciled, at the time of the birth of such child, in a foreign land, cannot be a natural-born citizen of the United States.

The terms of the Amendment in respect to birth and the being "*subject to the jurisdiction*" of the United States, in fact, refer and relate to the *native-born person* himself, and not to his parents.

The Article gives effect to *his* birth, "*subject to the jurisdiction*" of the United States, in investing him with natural-born citizenship of the United States, and the place of the "*domicile*" of the parents cannot determine the question as to whether the native-born person (whether the child of an alien or citizen) is, at the time of birth, "*subject to the jurisdiction*" of the United States.

It cannot be doubted that a person whose father and

mother are utterly unknown, a mere *foundling*, discovered to have been "*born*" upon the soil of the country, is a citizen under the Amendment. He is born "subject to the jurisdiction" of the United States. Nor can it be doubted that illegitimate children of foreign mothers, whose fathers are unknown, born here, are citizens.

The Constitution deals directly and conclusively, not with the parents of native-born persons, but *with the native persons themselves*, as at and from the moment of birth within the allegiance, or "subject to the jurisdiction," of the Government. That is the criterion of natural-born citizenship.

II. The "domicile" of origin of a person is identical with the domicile of his father at the time of his birth, but it has never been doubted that the law of the country of his nativity may constitute him a *citizen*, notwithstanding the fact that the domicile of his father, and, therefore, his own domicile, at the time of his birth, is in a foreign country. It was never supposed, therefore, that the "jurisdiction" of a State over a native-born person depended upon or was affected by the domicile of his parents or his own domicile at the time of his birth.

The domicile of origin of a person cannot be divested during his minority, except by the act of his father, and thus during the whole period of his minority he may be a citizen of the country of his birth, while *his parents and himself are domiciled in another land*.

The native-born child of a *citizen*, resident and permanently settled abroad, is not more completely "subject to the jurisdiction," in its full sense, of the country of his birth than the child born in the same country of a *foreign father*, whose home is in his own land.

III. The fact is that the Fourteenth Amendment contains no warrant for importing into the law of American citizenship the doctrine of "*domicile*," which pertains to that branch

of jurisprudence which deals with the "extraterritorial effect of law" or the "extraterritorial recognition of rights," commonly, though inaccurately, described as "private international law." (Holland, *Jurisprudence*, 369; Dicey, *Conflict of Laws*, 3.)

Jurists agree that for convenience in determining a man's personal status or capacity, or in administering his effects, or in matters of testamentary disposition, *domicile* is to be looked to as ascertaining by what law his rights and liabilities should be ascertained; but they also agree that the question of a man's *nationality* or *citizenship*—that is, his status as subject or citizen in relation to a particular sovereign or State—is distinct from that of his domicile, and that his domicile is not the criterion or test of his nationality or citizenship. (Savigny, *Private International Law*, 81; Westlake, *Private International Law*, p. 19; 4 Phillimore, *International Law*, 21; Lords Westbury and Hatherley, in *Udney vs. Udney*, L. R. Scotch Appeals, 1866-'69, pp. 45, 47.)

Mr. Dicey, in his *Conflict of Laws*, has well shown that while the principles of "private international law" are laws, in the strictest sense of the term, yet they are not *international* at all, for they are actual laws of a particular country, which determine the *private rights* of one individual against another, and they may or may not belong to the same nation, and that the term, therefore, is essentially inaccurate.

This inaccuracy has no doubt contributed to the misuse which has sometimes been made of the principle of domicile in connection with citizenship under the Constitution.

The erroneous notion that it is a doctrine of international law, or the law of nations, that "the child follows the nationality of the parents," has probably its origin, to some extent, in the inaccuracy of the term, private international law.

### Tenth.

*There is no foundation for any such extraordinary theory as that by "international law" the children born abroad of American citizens are regarded as citizens of the United States, and the children born here of foreigners are deemed to be citizens or subjects of their parents' country, whether the parents are in transient residence or settled in the country of their children's nativity.*

I. By "international law," used in any proper sense, is meant those rules of conduct which States regard as binding on them in their relations with one another, and as enforceable by appropriate means in case of infringement; but, as has been said before, the question whether the children born abroad of the citizens or subjects of a State shall have the nationality of their parents, anywhere or for any purpose, is outside the scope of those rules, and is left by them to the exclusive determination of the municipal laws of individual States.

International law has nothing to do with the question, and does not purport to determine it for any independent State, or express its approval of any specific usages or legislation in respect to the matter.

A nation is supposed to be the only proper judge of who are its citizens or subjects.

The Act of Congress of February 10, 1855, which extends American citizenship to persons born out of the limits and jurisdiction of the United States, whose fathers were at the time of their birth citizens of the United States, but limits the privilege to one generation, unless the parents have resided in the United States, and which was preceded by the Acts of 1790, 1795, and 1802, was passed in the exercise of the power of Congress to establish an uniform rule of natu-

ralization, and it was not supposed that the legislation was founded on or declaratory of any rule of "international law" by which the children born abroad of American citizens are regarded as citizens of the United States. The circumstance of the existence of this legislation shows that it was not believed that by "international law" such persons were citizens of the United States.

The only doubt was whether, by the dormant principles of the common law, constituting the basis of the municipal law of the United States in respect to citizenship, the children born in foreign countries of native-born American fathers were naturalized as citizens of the United States, and the legislation was intended to obviate that doubt. (*The Alienigenæ of the United States*, 2 Am. Law Reg., 193.)

Great Britain, also, by her municipal laws extends her nationality to the sons and grandsons of British subjects born within the allegiance of other countries; but no English jurist has ever asserted that this legislation proceeds upon any principle or rule of "international law" by which the children born of the subjects of one power within the territory of another are regarded as the subjects or citizens of the former.

Nor does Great Britain claim that by "international law" the children of her subjects born in foreign countries are not subject to the jurisdiction of those countries, and that they have not the full right to claim such persons as their natural-born subjects, and subject them to the obligations incident to their status as such natural-born subjects, so long, at least, as they continue to remain therein. On the contrary, it is declared by the British Government that the British nationality conferred by statute upon the children of British subjects born abroad cannot and does not avail them as against or in derogation of their antecedent obligations to the country of their birth. (*Diplomatic Correspond-*

ence, Naturalization Commission Report, Appendix, pp. 60, 67.)

II. There is, therefore, no principle or rule of international law by reference to which the Constitution can be so limited by construction as to exclude from natural-born citizenship any persons born of alien parents within the territorial jurisdiction of the United States.



### Eleventh.

*Manifestly, it was the express intention of the Amendment, by the words, "subject to the jurisdiction thereof," to except from the operation of the Article those native-born persons only who, under the law of nations, were exempted from and not subject to the operation of the territorial sovereignty and jurisdiction of the United States. It was specifically intended by those words to exclude no native-born persons by reason of the alienage of their parents, whether the latter were settled or merely temporarily sojourning in the United States at the time of the birth of their children.*

I. As has been said before, the Article contains no *express exceptions* to the rule of nationality which is declared and ordained by it. It is a general declaration by the people that "*all persons*" born in and subject to the jurisdiction of the United States "*are citizens of the United States and of the State wherein they reside.*"

If any persons "born" in the country are *aliens* and not citizens of the United States under the Amendment, their condition as such must result from a legal *construction* of the particular words, "subject to the jurisdiction thereof," which would impute to them an absolute *intention* to except such persons from natural-born citizenship of the United States.

II. There was no intention that those words should have the effect of a declaration of *alienage* against any persons of *domestic* birth. Under a construction of the Article, giving them that effect, a native-born alien may become a root or *stirpes* of alienage to his native-born child, who may communicate his alienage to his child, and so on successively down the line forever, and thus a *race of aliens, all born in*

*the United States*, may be established here, not one of whom may have ever left the country nor possessed any relation to any foreign country except that of remote origin.

These aliens of the United States, or some of them, although native-born, may be born *without any nationality*. While it is probably true that nations generally confer their citizenship upon the children of subjects born out of their dominions, yet, by the laws of many countries, their subjects *forfeit and lose* their nationality by acts done in a foreign country; thus, by the Code Napoleon, the quality of a Frenchman is *lost* as well by naturalization in a foreign country as by the unauthorized acceptance of public functions under a foreign government, and by any establishment in a foreign country *sans esprit de retour*.

Similar provisions exist in many continental countries, and are, perhaps, carried farthest in Russia, where, it is said, the quality of a Russian subject is lost by unauthorized residence abroad, by voluntary absence without the intention of return, and by *disappearance*; the last being presumed of every person liable to the capitation tax, who during ten years has not been heard of at the place of his domicile; and thus it must frequently happen that the Russian nationality is lost without acquiring any other.

So that the fathers of some of our supposed native American aliens may have actually forfeited or lost in one way or another their foreign nationality before their children were born in this country, and in that case their children would be aliens, not only of the United States, but also of the *country of their fathers*.

It will be presumed that the framers of the Article knew that the power to naturalize is applicable only to those of foreign birth, and that to make one of domestic birth a citizen is not naturalization, and that they were aware of the specific consequence, which has been pointed out, of any construction of the Article which would except from it the children born here of foreigners.

It may be said in reference to the consequence which has been indicated of such a construction of the Article as seems to be considered admissible by the Government, that there would come a time when the nationality of the original ancestor of our *native-born alien* would be extinguished and a new one would take its place by the mere fact of a succession of births in this country without naturalization; but nobody could, if he tried, point to anything in our polity or jurisprudence which would operate to make American citizens out of an original native-born alien stock by the fact of a succession of births during any length of time in the United States. The alienage of the original native-born alien would constitute an impassable barrier to the acquisition of citizenship by any of his descendants in the country.

In this connection it may be observed that in the converse case of the naturalization by the act of March 26, 1790, of the children of citizens of the United States born abroad, it was provided that the right of citizenship should not *descend to persons whose fathers had never been in the United States*.

A similar proviso is found in the Act of February 10, 1855. The proviso was intended to prevent the consequence of the establishment of a race of *foreign-born citizens* who, perhaps, had never been in the United States nor had any connection with the country except through a remote ancestor; but, while that could be done under the power of naturalization, nothing could be done under the Constitution to prevent the consequence of the establishment of a race of *native-born aliens* under a construction of the Fourteenth Amendment which would exclude native-born persons from natural-born citizenship on account of the alienage of their parents.

III. The Amendment includes and applies to *all* persons who are born in the territory of the United States and subject to its jurisdiction, and excepts *no* persons who are within that designation and description. The primary intention of the words, "subject to the jurisdiction thereof,"

was *inclusive* and not *exclusive* or *exceptive*, and it is by the effect only of an intention to except from the operation of the Amendment those native-born persons who are not within that designation, which may be *implied* from those words, that *any* native-born person can be deemed to be unaffected by the Article or excepted from its operation.

The words in question, therefore, must be construed as intended *not* to except from the operation of the Article *any* native-born persons who, agreeably to the settled principles of the law of nations, are, at the time of their birth, subject to the rights of sovereignty of the United States, its right of empire, as within its own dominions, and as intended to except from the effect of the Article those native-born persons *only* who, by the law of nations, are entitled to exemption from the operation of the sovereign power of the United States within and over its dominions.

The object of the words in question was to exclude the conclusion that the People in their sovereign capacity intended to impress allegiance to the United States upon persons who, though native-born, are, by the recognized principles of the law of nations, not under and subject to the right of empire of the United States, as an independent Sovereign Power, within its territorial domains, but are excepted from the right of empire of the United States.

It was not intended by the Article to disregard those acknowledged principles of the law of nations by which all sovereigns are understood to have "consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete *jurisdiction* within their respective territories which sovereignty confers," and by which "a nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should exercise its *territorial* powers in a manner not consonant to the usages and received obligations of the civilized world." (The Exchange, 7 Cranch, 137.)

In the absence of any qualifying words from the great

Amendment, it might have been supposed that its intended effect was to derogate from the international rights of persons born in the United States who are embraced by those cases of exception "in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial sovereignty and jurisdiction which is the attribute of every nation," and to set aside the immunity from the operation of the territorial jurisdiction enjoyed by such persons.

It was proper, therefore, that the Amendment should so describe and identify the native-born persons to whom it was intended to apply as not to embrace within its terms those native-born persons who are within the exemptions from the sovereign jurisdiction of the United States within the territories thereof, recognized by civilized nations.

And this was done, and intended to be done, and was all that was meant to be accomplished, by the words which affect with our allegiance and nationality all persons born in the country and subject to the jurisdiction of the United States.

IV. It is manifest, also, from every line and letter of the Amendment, that its framers intended to rest the rule of American nationality upon the great principle of the common law of allegiance and alienage, which immemorially governed, as they believed, the law of citizenship in the United States. That was the principle which Mr. Justice Curtis spoke of as the "great principle of public law, that allegiance and citizenship spring from the place of birth; that birth on the soil of a country both creates the duties and confers the rights of citizenship." By that principle the character of a natural-born citizen is incidental to birth only, and whatever was the situation or predicament of the parents, the being born within the allegiance (*i. e.*, within the dominions and under the protection) of the State, constitutes a natural-born citizen, and the being born outside the allegiance constitutes an alien. (*Doe vs. Jones*, 4 Term Reports, 308; *Ingulis vs. Sailors' Snug Harbor*, 3 Pet., 155.)

Thus, by the amendment, *all* persons "born" in the United States and subject to the jurisdiction thereof, are declared to be natural-born "citizens"—that is to say, persons who owe permanent allegiance to the United States by birth in its territory.

It was plainly intended, therefore, to except from the operation of the Amendment those only, who, though born in our dominions, are not born, in the view of the common law, and the law of nations, within the allegiance of the United States, but are born under a *foreign* allegiance, and owe obedience and duty to the laws of a foreign government alone. Such persons are not born in the United States "subject to the jurisdiction of the United States," but are born therein subject to the "jurisdiction" of a foreign power. They are conceived by the common law as well as by the law of nations (which is, indeed, a part of the common law) as being born *outside* of the territory of the United States, and not subject to its jurisdiction, but subject to the jurisdiction of a foreign State.

In the development of the common law there came a time when allegiance was regarded as "something *geographical*", and the term itself was used in a geographical sense, persons being expressed as born within or without the allegiance when little more was meant than that they were *born* within or without the realm" (Westlake, *Private Int. Law*, p. 9). Mr. Westlake says:

"It is no real exception to such a geographical sense that the children of (English) ambassadors born abroad are said to have been born *within the allegiance*, for an ambassador's house is reputed *part of his sovereign's realm*, and the 25 Edw. 3 St., 2, shows that the same exception was not made in favor of the children whose parents served the King abroad in any other capacity. The children, however, of the King's enemies born within any portion of the realm of which their parents might be in hostile occupation were not reputed born within the allegiance." Calvin's case, 7 Coke, p. 18a.

In its geographical sense, the doctrine of allegiance was meant to be retained and embodied in the Fourteenth Amendment.

V. It was not intended by any language in the Amendment to allow the *status* of any native-born persons, as citizens or aliens in their relation to the United States, to be fixed in any wise by the laws of nationality of any foreign States of which the parents of such persons might be citizens or subjects, or to recognize those foreign laws as having operation upon native-born persons within the territory of the United States.

The Amendment, as we have said, is an expression of the great underlying principle of the customary law of England and the United States that the child's first protector is the government under which it was born, and that it owes a primary, natural, and legal obligation to that government and not to the country of his father's birth, and was not intended to allow the original status of any persons born within the domains of the United States to be assigned to them by foreign laws based upon a different principle of original nationality.

If it had been intended by the great Amendment to recast the doctrine of American nationality by recognizing descent as the accepted rule of American citizenship, that rule would have been expressly declared by the Article.

### Twelfth.

*There is not and never was any rule of international law by which the nationality of children born of the subjects of one power within the territory of another is dictated by descent, and not by place of birth, or by which (to use the common expression) the child follows the nationality of the parents. Any theory, therefore, that the Fourteenth Amendment was intended to be declaratory of that rule as a rule of international law is without the least foundation.*

I. Primarily, as has been observed, international law as such has nothing to do with nationality, which is the *status* of an individual in relation to a particular State as its citizen or subject, and it is for the municipal law of every independent nation to determine whether a given individual is to be considered a member—that is to say, a citizen or subject—of that State. In other words, the relation of *sovereign and subject or citizen* is the creature of municipal law, and international law does not purport to lay down principles or sanction specific usages in that matter. There is no such doctrine of international law as that “the child follows the condition of his parents.”

Before the Code Napoleon by France, as observed by Mr. William Edward Hall, in his work on International Law, no nation regarded the children of foreigners born upon its soil as aliens, and although the continental nations after the establishment of that Code generally adopted by their municipal laws the rule that primarily the nationality of a child in the country of birth follows that of the parents, it was never fancied that they did so in conformity with any doctrine of international law (Hall, International Law, § 68, p. 235). It was never supposed that the



rule was founded upon anything except conventional and domestic policy.

The Code Napoleon, at any rate, was nothing but a compromise with the old rule of French nationality. It made the child of an alien born in France, who, during the year following his majority, should elect to be a French citizen, a Frenchman, *from the time of his birth*, thus recognizing the place of birth, after all, as the original and natural criterion of nationality.

The absurdity of speaking of the rule of the Code of Napoleon as a rule of international law is illustrated by the present French rule of nationality, under the recent laws of June 26, 1889, and July 29, 1893, which, having thrown the Code of Napoleon overboard, are founded upon no apparent principle except a policy to impress French national character upon as large a number of persons as possible. The law of 1889 was communicated by Mr. Reid, our minister to France, to Mr. Blaine in his dispatch of July 16, 1889. (Foreign Relations of U. S., 1890, p. 270.) The law makes *natural-born* Frenchmen of all persons "born in France whose fathers were not French and not born in France if they reside in France at the time of their majority, *unless they disclaim French nationality and prove by a certificate of the Government of their father that they have retained his nationality.*"

Mr. Reid stated :

"Formerly they retained the nationality of the father, unless they claimed French citizenship; now they take French nationality, unless they claim the citizenship of the father. It thus appears (1) that the son of a naturalized French-American who happens to be born in France is French; (2) that the son of a native American, established in France for business purposes, is also French if he fails to claim his American citizenship at the age of 21 and if he is not supported in this claim by the United States Government; (3) that the son of a Frenchman born in the United States is French, and as the law is silent as to as to any lim-

itation, there may be, according to this doctrine, *many generations of Frenchmen born in the United States—a doctrine which, if it were enforced by the other European nations, would make every native-born American the subject of another country.*"

Mr. Westlake may well say that there are no rules of universal acceptance by which States are guided in claiming or rejecting persons as their members. (Private International Law, p. 5.)

II. On May 21, 1868, about two months before the adoption of the Fourteenth Amendment, the British government appointed the Commission, composed of Lord Clarendon, Mr. Cardwell, Sir Robert J. Phillimore, Baron Bramwell, Sir John Karslake, Sir Travers Twiss, Sir Roundell Palmer, Mr. Forster, Mr. Vernon Harcourt, and Mr. Mountague Bernard, to investigate the laws of allegiance and naturalization. It was not supposed by these jurists and publicists that there was any international-law rule that "the child follows the nationality of his parents." They divided upon the question whether it was expedient for Great Britain to change her law by providing that a child born in England of an alien father born abroad should be an alien. The majority of the Commission were of opinion that the child of an alien born in England should be, as before, a natural-born British subject, with the right of registering himself as an alien before exercising or claiming any right or privilege as a British subject. They thus advised Great Britain to adhere in principle to the common-law rule of citizenship, and this was done by the Naturalization Act of 33 Victoria, ch. 14, "to amend the law relating to the legal condition of aliens and British subjects," above referred to. (L. R. Stats., vol. V, 1870, p. 166.) So that in England a person born of an alien father is a natural-born British subject, with the right to make the declaration of alienage provided for by that Act. The difference caused by descent

from parents who are aliens has reference not to the acquisition of, but to the mode of *changing* British nationality.

III. The report of the British Commission did not propose to make, nor does the act of 33 Victoria make, the *domicile* of the alien parent a condition of the British nationality of the child, and a mere *casual birth* in England, as we suppose, has still the effect of conferring the character of a natural-born British subject. All the members of the Commission rejected any idea of founding a rule of nationality on *domicile*—*i. e.*, that the home of a man's choice should also be the country of his allegiance.

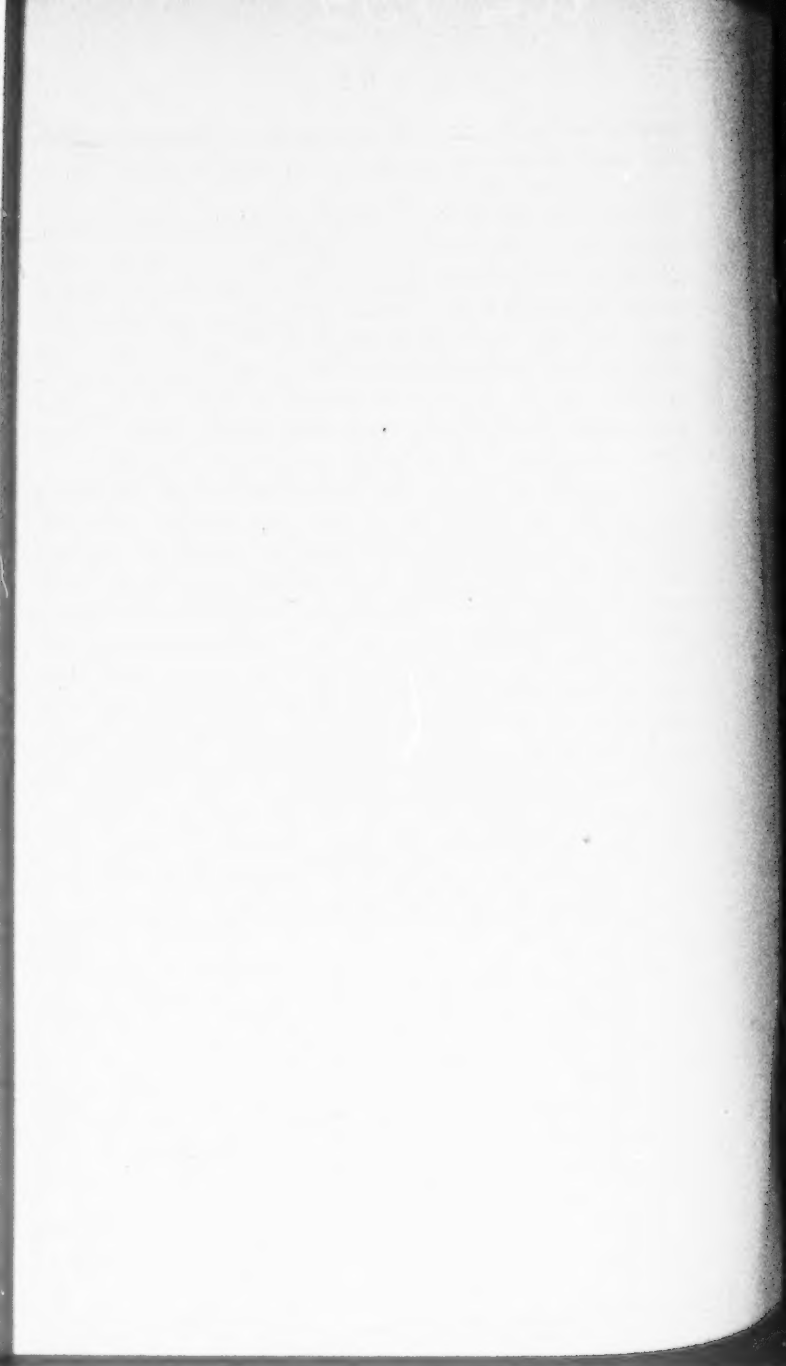
The members of the Commission who favored a material change in the British law by adopting descent as the primary rule of original nationality, did so mainly upon the ground that such a rule would tend to remove existing conflict of laws on that subject and prevent double nationalities; but the majority of the Commission were of opinion that the solid, practical advantages of the English and American principle of determining nationality by birth within the dominions of the State were much greater than any disadvantage arising from adherence to that principle.

### Thirteenth.

*The judgment of the court below was correct and should be affirmed.*

J. HUBLEY ASHTON,

*Counsel for Appellee.*







IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1896.

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No. 449.

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THE UNITED STATES, APPELLANT,

vs.

WONG KIM ARK, APPELLEE.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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*Note in Answer to "Reply Brief for the United States."*

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The notion suggested apparently in the "Reply Brief for the United States," that at common law the children born out of the British dominions of a natural-born British subject, not an ambassador of the Crown, were natural-born British subjects, and not aliens, is disposed of by the great authorities on English law referred to in the Briefs for the Appellee; and to these may be added the decision in the case of *De Geer vs. Stone*, 1882, 22 Ch. Div., 247, which is cited by Mr. Westlake in the third edition of his work on Private International Law, pp. 324-326, as determin-

ing that the common-law principle by which the children of *ambassadors* in the service of the Crown are treated as natural-born British subjects, does not apply even to the *children born of officers in the military or naval service of the Crown in foreign countries*, and that no children, neither whose fathers nor whose paternal grandfathers were born within British dominions, have been made British subjects by any Act of Parliament.

The interesting and luminous judgment of Mr. Justice Kay, in that case, accords with the opinion of Lord Chief Justice Cockburn, in his Treatise on Nationality (pp. 7-10), already cited (to which the judgment refers), and with the opinion of the British Naturalization Commission of 1868, that by the common law *no effect was given to descent as a source of nationality*, and that the Act of the 25th Edward III, and subsequent British statutes, relieving from alienage the foreign-born children of British subjects, were not *declaratory* of the common law, but were *substantive enactments*.

The *only* exception, therefore, if it can be called an exception, to the rule of the alienage at common law of the children of natural-born British subjects born abroad, is in favor of the children of ambassadors; but they constitute no real exception, as Mr. Westlake observes, because an ambassador's house is reputed part of his *sovereign's realm*. (Priv. Int. Law, 1st ed., p. 9.)

Mr. Westlake, in the last edition of his work, says, at page 324, that the statement by Dyer, in a note on page 224 of his reports, that it was adjudged, in Tr. 7 E. 3, that children of subjects born beyond sea, in the service of the King, shall be inheritable, is a pure mistake. Mr. Westlake searched the roll, with the expert assistance of Mr. Selby, and they found that Dyer had entirely misread or misunderstood the words on which his statement was based, and which, correctly *translated*, mean only that a certain person was then *living* beyond sea, not that he had been *born* beyond sea.



The *quære* of the learned Solicitor General (Brief, p. 20) in regard to the legislation of Congress in the Acts of April 14, 1802, and February 10, 1855, and the principles upon which it is based, is responded to with the accurate and profound knowledge of the common law possessed by Horace Binney, in the article published by him, in 1854, in the American Law Register, which is referred to in the Brief of Mr. Evarts, and also in the Brief of the undersigned. ("The Alienigenæ of the United States," 2 American Law Register, p. 194.)

J. HUBLEY ASHTON,

*Of Counsel for the Appellee.*



## Statement of the Case.

## UNITED STATES v. WONG KIM ARK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF CALIFORNIA.

No. 132. Argued March 5, 8, 1897. — Decided March 28, 1898.

A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

THIS was a writ of *habeas corpus*, issued October 2, 1895, by the District Court of the United States for the Northern District of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark, who alleged that he was a citizen of the United States, of more than twenty-one years of age, and was born at San Francisco in 1873 of parents of Chinese descent and subjects of the Emperor of China, but domiciled residents at San Francisco; and that, on his return to the United States on the steamship Coptic in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction, in violation of the Constitution and laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretence that he was not a citizen of the United States.

At the hearing, the District Attorney of the United States was permitted to intervene in behalf of the United States in opposition to the writ, and stated the grounds of his intervention in writing as follows:

"That, as he is informed and believes, the said person in

## Statement of the Case.

whose behalf said application was made is not entitled to land in the United States, or to be or remain therein, as is alleged in said application, or otherwise.

"Because the said Wong Kim Ark, although born in the city and county of San Francisco, State of California, United States of America, is not, under the laws of the State of California and of the United States, a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons and subjects of the Emperor of China, and the said Wong Kim Ark being also a Chinese person and a subject of the Emperor of China.

"Because the said Wong Kim Ark has been at all times, by reason of his race, language, color and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation.

"That the said Wong Kim Ark is not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of Congress, known as the Chinese Exclusion Acts,<sup>1</sup> which would exempt him from the class or classes which are especially excluded from the United States by the provisions of the said acts.

"Wherefore the said United States Attorney asks that a judgment and order of this honorable court be made and entered in accordance with the allegations herein contained, and that the said Wong Kim Ark be detained on board of said vessel until released as provided by law, or otherwise to be returned to the country from whence he came, and that such further order be made as to the court may seem proper and legal in the premises."

The case was submitted to the decision of the court upon the following facts agreed by the parties:

"That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento Street, in the city and county of San Francisco, State of California, United States of America, and

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<sup>1</sup> Acts of May 6, 1882, c. 126, 22 Stat. 58; July 5, 1884, c. 220, 23 Stat. 115; September 13, 1888, c. 1015, and October 1, 1888, c. 1064, 25 Stat. 476, 504; May 5, 1892, c. 60, 27 Stat. 25; August 18, 1894, c. 301, 28 Stat. 390.

## Statement of the Case.

that his mother and father were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

"That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile and residence therein at said city and county of San Francisco, State aforesaid.

"That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

"That during all the time of their said residence in the United States as domiciled residents therein the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

"That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

"That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on July 26, 1890, on the steamship *Gælic*, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States.

"That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land; and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

## Opinion of the Court.

"That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The court ordered Wong Kim Ark to be discharged, upon the ground that he was a citizen of the United States. 71 Fed. Rep. 382. The United States appealed to this court, and the appellee was admitted to bail pending the appeal.

*Mr. Solicitor General Conrad*, with whom was *Mr. George D. Collins* on the brief, for appellants.

*Mr. Maxwell Evarts* and *Mr. J. Hubley Ashton*, for appellee. *Mr. Thomas D. Riordan* filed a brief for same.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him

## Opinion of the Court.

therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history,

## Opinion of the Court.

of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States;" and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd v. United States*, 116 U. S. 616, 624, 625; *Smith v. Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore v. United States*, 91 U. S. 270, 274.



## Opinion of the Court.

In *Minor v. Happersett*, Chief Justice Waite, when construing, in behalf of the court, the very provision of the Fourteenth Amendment now in question, said: "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that." And he proceeded to resort to the common law as an aid in the construction of this provision. 21 Wall. 167.

In *Smith v. Alabama*, Mr. Justice Matthews, delivering the judgment of the court, said: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes." "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." 124 U. S. 478.

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, et subiectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.

This fundamental principle, with these qualifications or

## Opinion of the Court.

explanations of it, was clearly, though quaintly, stated in the leading case, known as *Calvin's Case*, or the *Case of the Post-nati*, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the Judges of England, and reported by Lord Coke and by Lord Ellesmere. *Calvin's Case*, 7 Rep. 1, 4b-6a, 18a, 18b; Ellesmere on Post-nati, 62-64; *S. C.*, 2 Howell's State Trials, 559, 607, 613-617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Lit. 8a, 128b; Lord Hale, in Hargrave's Law Tracts, 210, and in 1 Hale P. C. 61, 62; 1 Bl. Com. 366, 369, 370, 374; 4 Bl. Com. 74, 92; Lord Kenyon, in *Doe v. Jones*, 4 T. R. 300, 308; Cockburn on Nationality, 7; Dicey Conflict of Laws, pp. 173-177, 741.

In *Udny v. Udny*, (1869) L. R. 1 H. L. Sc. 441, the point decided was one of inheritance, depending upon the question whether the domicil of the father was in England or in Scotland, he being in either alternative a British subject. Lord Chancellor Hatherley said: "The question of naturalization and of allegiance is distinct from that of domicil." p. 452. Lord Westbury, in the passage relied on by the counsel for the United States, began by saying: "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions: one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status." And then, while maintaining that the civil status is universally governed by the single principle of domicil, *domicilium*, the criterion established by international law for the purpose of determining civil status, and the basis on which "the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or in-

## Opinion of the Court.

testacy, must depend;" he yet distinctly recognized that a man's political status, his country, *patria*, and his "nationality, that is, natural allegiance," "may depend on different laws in different countries." pp. 457, 460. He evidently used the word "citizen," not as equivalent to "subject," but rather to "inhabitant;" and had no thought of impeaching the established rule that all persons born under British dominion are natural-born subjects.

Lord Chief Justice Cockburn, in the same year, reviewing the whole matter, said: "By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality." Cockburn on Nationality, 7.

Mr. Dicey, in his careful and thoughtful Digest of the Law of England with reference to the Conflict of Laws, published in 1896, states the following propositions, his principal rules being printed below in italics: "*'British subject' means any person who owes permanent allegiance to the Crown. 'Permanent' allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes 'temporary' allegiance to the Crown. 'Natural-born British subject' means a British subject who has become a British subject at the moment of his birth.*" "*Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject.*" This rule contains the leading principle of English law on the subject of British nationality." The exceptions afterwards mentioned by Mr. Dicey are only these two: "1. Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such

## Opinion of the Court.

person's birth is in hostile occupation, is an alien." "2. Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the Sovereign of a foreign State is (though born within the British dominions) an alien." And he adds: "The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the King of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown." Dicey Conflict of Laws, pp. 173-177, 741.

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

In the early case of *The Charming Betsy*, (1804) it appears to have been assumed by this court that all persons born in the United States were citizens of the United States; Chief Justice Marshall saying: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of

## Opinion of the Court.

that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide." 2 Cranch, 64, 119.

In *Inglis v. Sailors' Snug Harbor*, (1830) 3 Pet. 99, in which the plaintiff was born in the city of New York, about the time of the Declaration of Independence, the justices of this court (while differing in opinion upon other points) all agreed that the law of England as to citizenship by birth was the law of the English Colonies in America. Mr. Justice Thompson, speaking for the majority of the court, said: "It is universally admitted, both in the English courts and in those of our own country, that all persons born within the Colonies of North America, whilst subject to the Crown of Great Britain, were natural-born British subjects." 3 Pet. 120. Mr. Justice Johnson said: "He was entitled to inherit as a citizen born of the State of New York." 3 Pet. 136. Mr. Justice Story stated the reasons upon this point more at large, referring to *Calvin's Case*, Blackstone's Commentaries, and *Doe v. Jones*, above cited, and saying: "Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the allegiance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*. There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be

## Opinion of the Court.

subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." 3 Pet. 155. "The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens." 3 Pet. 156. "Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." 3 Pet. 164.

In *Shanks v. Dupont*, 3 Pet. 242, decided (as appears by the records of this court) on the same day as the last case, it was held that a woman born in South Carolina before the Declaration of Independence, married to an English officer in Charleston during its occupation by the British forces in the Revolutionary War, and accompanying her husband on his return to England, and there remaining until her death, was a British subject, within the meaning of the Treaty of Peace of 1783, so that her title to land in South Carolina, by descent cast before that treaty, was protected thereby. It was of such a case, that Mr. Justice Story, delivering the opinion of the court, said: "The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations." 3 Pet. 248. This last sentence was relied on by the counsel for the United States, as showing that the question whether a person is a citizen of a particular country is to be determined, not by the law of that country, but by the principles of international law. But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the operation of the established rule of citizenship by birth within the United States; for he referred (p. 245) to the contemporaneous opinions in *Inglis v. Sailors' Snug Harbor*,

## Opinion of the Court.

above cited, in which this rule had been distinctly recognized, and in which he had said (p. 162) that "each government had a right to decide for itself who should be admitted or deemed citizens;" and in his Treatise on the Conflict of Laws, published in 1834, he said that, in respect to residence in different countries or sovereignties, "there are certain principles which have been generally recognized, by tribunals administering public law, [adding, in later editions, "or the law of nations,"] as of unquestionable authority," and stated, as the first of those principles, "Persons who are born in a country are generally deemed citizens and subjects of that country." Story Conflict of Laws, § 48.

The English statute of 11 & 12 Will. III, (1700) c. 6, entitled "An act to enable His Majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens," enacted that "all and every person or persons, being the King's natural-born subject or subjects, within any of the King's realms or dominions," might and should thereafter lawfully inherit and make their titles by descent to any lands "from any of their ancestors, lineal or collateral, although the father and mother, or father or mother, or other ancestor, of such person or persons, by, from, through or under whom" title should be made or derived, had been or should be "born out of the King's allegiance, and out of His Majesty's realms and dominions," as fully and effectually, as if such parents or ancestors "had been naturalized or natural-born subject or subjects within the King's dominions." 7 Statutes of the Realm, 590. It may be observed that, throughout that statute, persons born within the realm, although children of alien parents, were called "natural-born subjects." As that statute included persons born "within any of the King's realms or dominions," it of course extended to the Colonies, and, not having been repealed in Maryland, was in force there. In *McCreery v. Somerville*, (1824) 9 Wheat. 354, which concerned the title to land in the State of Maryland, it was assumed that children born in that State of an alien who was still living, and who had not been naturalized, were "native-born citizens of the



## Opinion of the Court.

United States ;" and without such assumption the case would not have presented the question decided by the court, which, as stated by Mr. Justice Story in delivering the opinion, was "whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural-born subject." 9 Wheat. 356.

Again, in *Levy v. McCartee*, (1832) 6 Pet. 102, 112, 113, 115, which concerned a descent cast since the American Revolution, in the State of New York, where the statute of 11 & 12 Will. III had been repealed, this court, speaking by Mr. Justice Story, held that the case must rest for its decision exclusively upon the principles of the common law; and treated it as unquestionable that by that law a child born in England of alien parents was a natural-born subject; quoting the statement of Lord Coke in Co. Lit. 8a, that "if an alien cometh into England and hath issue two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm;" and saying that such a child "was a native-born subject, according to the principles of the common law, stated by this court in *McCreery v. Somerville*, 9 Wheat. 354."

In *Dred Scott v. Sandford*, (1857) 19 How. 393, Mr. Justice Curtis said: "The first section of the second article of the Constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." 19 How. 576. And to this extent no different opinion was expressed or intimated by any of the other judges.

In *United States v. Rhodes*, (1866) Mr. Justice Swayne, sitting in the Circuit Court, said: "All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England." "We find no warrant for the opinion



## Opinion of the Court.

that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution." 1 Abbott (U. S.) 28, 40, 41.

The Supreme Judicial Court of Massachusetts, speaking by Mr. Justice (afterwards Chief Justice) Sewall, early held that the determination of the question whether a man was a citizen or an alien was "to be governed altogether by the principles of the common law," and that it was established, with few exceptions, "that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship.'" *Gardner v. Ward*, (1805) 2 Mass. 244, note. And again: "The doctrine of the common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born." *Kilham v. Ward*, (1806) 2 Mass. 236, 265. It may here be observed that in a recent English case Lord Coleridge expressed the opinion of the Queen's Bench Division that the statutes of 4 Geo. II, (1731) c. 21, and 13 Geo. III, (1773) c. 21, (hereinafter referred to,) "clearly recognize that to the King in his politic, and not in his personal capacity, is the allegiance of his subjects due." *Isaacson v. Durant*, 17 Q. B. D. 54, 65.

The Supreme Court of North Carolina, speaking by Mr. Justice Gaston, said: "Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens." "Upon the Revolution, no other change took place in the law of North Carolina, than was consequent upon the transition from a colony dependent on an European King to a free and sov-

## Opinion of the Court.

foreign State;" "British subjects in North Carolina became North Carolina freemen;" "and all free persons born within the State are born citizens of the State." "The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the king' is now 'a citizen of the State.'" *State v. Manuel*, (1838) 4 Dev. & Bat. 20, 24-26.

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than fifty years after the adoption of the Constitution, when the matter was elaborately argued in the Court of Chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. *Lynch v. Clarke*, (1844) 1 Sandf. Ch. 583.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, Secretary of State, in 1854, 2 Whart. Int. Dig. (2d ed.) p. 394; by Attorney General Black in 1859, 9 Opinions, 373; and by Attorney General Bates in 1862, 10 Opinions, 328, 382, 394, 396.

Chancellor Kent, in his Commentaries, speaking of the "general division of the inhabitants of every country, under the comprehensive title of aliens and natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent." "To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a State, while

## Opinion of the Court.

abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered." 2 Kent Com. (6th ed.) 39, 42. And he elsewhere says: "And if, at common law, all human beings born within the ligeance of the King, and under the King's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States, in all cases in which there is no express constitutional or statute declaration to the contrary." "Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land." 2 Kent Com. 258, note.

Mr. Binney, in the second edition of a paper on the Alienigenæ of the United States, printed in pamphlet at Philadelphia, with a preface bearing his signature and the date of December 1, 1853, said: "The common law principle of allegiance was the law of all the States at the time of the Revolution, and at the adoption of the Constitution; and by that principle the citizens of the United States are, with the exceptions before mentioned," (namely, foreign-born children of citizens, under statutes to be presently referred to,) "such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States." p. 20. "The right of citizenship never *descends* in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle."

## Opinion of the Court.

p. 22, note. This paper, without Mr. Binney's name, and with the note in a less complete form and not containing the passage last cited, was published (perhaps from the first edition) in the American Law Register for February, 1854. 2 Amer. Law Reg. 193, 203, 204.

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile;" and children born in a foreign country, of a French father who had not established his domicile there nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of extritoriality, considered as born in France, and therefore invested with French nationality." Pothier *Traité des Personnes*, pt. 1, tit. 2, sect. 1, nos. 43, 45; *Walsh-Serrant v. Walsh-Serrant*, (1802) 3 *Journal du Palais*, 384; *S. C.*, 8 *Merlin, Jurisprudence*, (5th ed.) *Domicile*, § 13; *Préfet du Nord v. Lebeau*, (1862) *Journal du Palais*, 1863, 312 and note; 1 *Laurent Droit Civil*, no. 321; 2 *Calvo Droit International*, (5th ed.) § 542; *Cockburn on Nationality*, 13, 14; *Hall's International Law*, (4th ed.) § 68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. *Constitutions et Chartes*, (ed. 1830) pp. 100, 136, 148, 186.

## Opinion of the Court.

The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli*, the rule of descent or blood, *jus sanguinis*, as the leading principle; but an eminent commentator has observed that the framers of that code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe—*de la vieille règle française, ou plutôt même de la vieille règle européenne*—according to which nationality had always been, in former times, determined by the place of birth." 1 Demolombe Cours de Code Napoleon, (4th ed.) no. 146.

The later modifications of the rule in Europe rest upon the constitutions, laws or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English Naturalization Act of 33 Vict. (1870) c. 14, and the Commissioners' Report of 1869 out of which it grew, both bear date since the adoption of the Fourteenth Amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey Conflict of Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece and Russia. Cockburn on Nationality, 14-21.

There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

## Opinion of the Court.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed, at various times, enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.

The earliest statute was passed in the reign of Edward III. In the Rolls of Parliament of 17 Edw. III, (1343) it is stated that "before these times there have been great doubt and difficulty among the Lords of this realm, and the Commons, as well men of the law as others, whether children who are born in parts beyond sea ought to bear inheritance after the death of their ancestors in England, because no certain law has been thereon ordained;" and by the King, Lords and Commons, it was unanimously agreed that "there was no manner of doubt that the children of our Lord the King, whether they were born on this side the sea or beyond the sea, should bear the inheritance of their ancestors;" "and in regard to other children, it was agreed in this Parliament, that they also should inherit wherever they might be born in the service of the King;" but, because the Parliament was about to depart, and the business demanded great advisement and good deliberation how it should be best and most surely done, the making of a statute was put off to the next Parliament. 2 Rot. Parl. 139. By reason, apparently, of the prevalence of the plague in England, no act upon the subject was passed until 25 Edw. III, (1350) when Parliament passed an act, entitled "A statute for those who are born in parts beyond sea," by which — after reciting that "some people be in doubt if the children born in the parts beyond the sea, out of the ligeance of England, should be able to demand any inheritance within the same ligeance, or not, whereof a petition was put

## Opinion of the Court.

in the Parliament" of 17 Edw. III, "and was not at the same time wholly assented" — it was (1) agreed and affirmed, "that the law of the Crown of England is, and always hath been such, that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors;" (2) also agreed that certain persons named, "which were born beyond the sea, out of the ligeance of England, shall be from henceforth able to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of England, as well as those that should be born within the same ligeance:" (3) and further agreed "that all children inheritors, which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid, in time to come; so always, that the mothers of such children do pass the sea by the licence and wills of their husbands." 2 Rot. Parl. 231; 1 Statutes of the Realm, 310.

It has sometimes been suggested that this general provision of the statute of 25 Edw. III was declaratory of the common law. See Bacon, *arguendo*, in *Calvin's Case*, 2 Howell's State Trials, 585; Westlake and Pollock, *arguendo*, in *De Geer v. Stone*, 22 Ch. D. 243, 247; 2 Kent Com. 50, 53; *Lynch v. Clarke*, 1 Sandf. Ch. 583, 659, 660; *Ludlam v. Ludlam*, 26 N. Y. 356. But all suggestions to that effect seem to have been derived, immediately or ultimately, from one or the other of these two sources: The one, the Year Book of 1 Ric. III, (1483) fol. 4, pl. 7, reporting a saying of Hussey, C. J., "that he who is born beyond sea, and his father and mother are English, their issue inherit by the common law, but the statute makes clear, &c.," — which, at best, was but *obiter dictum*, for the Chief Justice appears to have finally rested his opinion on the statute. The other, a note added to the edition of 1688 of Dyer's Reports, 224*a*, stating that at Trinity Term 7 Edw. III, Rot. 2 B. R., it was adjudged that children of subjects born



## Opinion of the Court.

beyond the sea in the service of the King were inheritable — which has been shown, by a search of the roll in the King's Bench so referred to, to be a mistake, inasmuch as the child there in question did not appear to have been born beyond sea, but only to be living abroad. Westlake's *Private International Law*, (3d ed.) 324.

The statute of 25 Edw. III recites the existence of doubts as to the right of foreign-born children to inherit in England; and, while it is declaratory of the rights of children of the King, and is retrospective as to the persons specifically named, yet as to all others it is, in terms, merely prospective, applying to those only "who shall be born henceforth." Mr. Binney, in his paper above cited, after a critical examination of the statute, and of the early English cases, concluded: "There is nothing in the statute which would justify the conclusion that it is declaratory of the common law in any but a single particular, namely, in regard to the children of the King; nor has it at any time been judicially held to be so." "The notion that there is any common law principle to naturalize the children born in foreign countries, of native-born American father *and* mother, father *or* mother, must be discarded. There is not, and never was, any such common law principle." Binney on *Alienigenæ*, 14, 20; 2 *Amer. Law. Reg.* 199, 203. And the great weight of the English authorities, before and since he wrote, appears to support his conclusion. *Calvin's Case*, 7 Rep. 17a, 18a; Co. Lit. 8a, and Hargrave's note 36; 1 Bl. Com. 373; Barrington on Statutes, (5th ed.) 268; Lord Kenyon, in *Doe v. Jones*, 4 T. R. 300, 308; Lord Chancellor Cranworth, in *Shedden v. Patrick*, 1 Macq. 535, 611; Cockburn on Nationality, 7, 9; *De Geer v. Stone*, 22 Ch. D. 243, 252; Dicey Conflict of Laws, 178, 741. "The acquisition," says Mr. Dicey, (p. 741) "of nationality by descent, is foreign to the principles of the common law, and is based wholly upon statutory enactments."

It has been pertinently observed that if the statute of Edward III had only been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary. Cockburn on Nationality, 9. By the



## Opinion of the Court.

statute of 29 Car. II, (1677) c. 6, § 1, entitled "An act for the naturalization of children of His Majesty's subjects born in foreign countries during the late troubles," all persons who, at any time between June 14, 1641, and March 24, 1660, "were born out of His Majesty's dominions, and whose fathers or mothers were natural-born subjects of this realm," were declared to be natural-born subjects. By the statute of 7 Anne, (1708) c. 5, § 3, "the children of all natural-born subjects, born out of the ligeance of Her Majesty, her heirs and successors" — explained by the statute of 4 Geo. II, (1731) c. 21, to mean all children born out of the ligeance of the Crown of England, "whose fathers were or shall be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively" — "shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever." That statute was limited to foreign-born children of natural-born subjects; and was extended by the statute of 13 Geo. III, (1773) c. 21, to foreign-born grandchildren of natural-born subjects, but not to the issue of such grandchildren; or, as put by Mr. Dicey, "British nationality does not pass by descent or inheritance beyond the second generation." See *De Geer v. Stone*, above cited; Dicey Conflict of Laws, 742.

Moreover, under those statutes, as is stated in the Report in 1869 of the Commissioners for inquiring into the Laws of Naturalization and Allegiance, "no attempt has ever been made on the part of the British Government, (unless in Eastern countries where special jurisdiction is conceded by treaty,) to enforce claims upon, or to assert rights in respect of, persons born abroad, as against the country of their birth whilst they were resident therein, and when by its law they were invested with its nationality." In the appendix to their report are collected many such cases in which the British Government declined to interpose, the reasons being most clearly brought out in a dispatch of March 13, 1858, from Lord Malmesbury, the Foreign Secretary, to the British Ambassador at Paris, saying: "It is competent to any country to confer by general or special legislation the privileges of nationality upon those

## Opinion of the Court.

who are born out of its own territory; but it cannot confer such privileges upon such persons as against the country of their birth, when they voluntarily return to and reside therein. Those born in the territory of a nation are (as a general principle) liable when actually therein to the obligations incident to their status by birth. Great Britain considers and treats such persons as natural-born subjects, and cannot therefore deny the right of other nations to do the same. But Great Britain cannot permit the nationality of the children of foreign parents born within her territory to be questioned." Naturalization Commission Report, pp. viii, 67; U. S. Foreign Relations, 1873-1874, pp. 1237, 1337. See also *Drummond's Case*, (1834) 2 Knapp, 295.

By the Constitution of the United States, Congress was empowered "to establish an uniform rule of naturalization." In the exercise of this power, Congress, by successive acts, beginning with the act entitled "An act to establish an uniform rule of naturalization," passed at the second session of the First Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts of March 26, 1790, c. 3; January 29, 1795, c. 20; June 18, 1798, c. 54; 1 Stat. 103, 414, 566; April 14, 1802, c. 28; March 26, 1804, c. 47; 2 Stat. 153, 292; February 10, 1855, c. 71; 10 Stat. 604; Rev. Stat. §§ 2165, 2172, 1993.

In the act of 1790, the provision as to foreign-born children of American citizens was as follows: "The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: Provided, that the right of citizenship shall not descend to persons whose fathers have never been

## Opinion of the Court.

resident in the United States." 1 Stat. 104. In 1795, this was reenacted, in the same words, except in substituting, for the words "beyond sea, or out of the limits of the United States," the words "out of the limits and jurisdiction of the United States." 1 Stat. 415.

In 1802, all former acts were repealed, and the provisions concerning children of citizens were reenacted in this form: "The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the said States under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." Act of April 14, 1802, c. 28, § 4; 2 Stat. 155.

The provision of that act, concerning "the children of persons duly naturalized under any of the laws of the United States," not being restricted to the children of persons already naturalized, might well be held to include children of persons thereafter to be naturalized. 2 Kent Com. 51, 52; *West v. West*, 8 Paige, 433; *United States v. Kellar*, 11 Bissell, 314; *Boyd v. Thayer*, 143 U. S. 135, 177.

But the provision concerning foreign-born children, being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. 2 Kent Com. 52, 53; Binney on Alienigenæ, 20, 25; 2 Amer. Law Reg. 203, 205. Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law.

In accordance with his suggestions, it was enacted by the

## Opinion of the Court.

statute of February 10, 1855, c. 71, that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." 10 Stat. 604; Rev. Stat. § 1993.

It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of Congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States. Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty.

So far as we are informed, there is no authority, legislative, executive or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective,) conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country, which have gone the farthest towards holding such statutes to be but declaratory of the common law, have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent Com. 39, 50, 53, 258 note; *Lynch v. Clarke*, 1 Sandf. Ch. 583, 659; *Ludlam v. Ludlam*, 26 N. Y. 356, 371.

Passing by questions once earnestly controverted, but finally put at rest by the Fourteenth Amendment of the Constitution, it is beyond doubt that, before the enactment of the Civil Rights Act of 1866 or the adoption of the Constitutional

## Opinion of the Court.

Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the fore front, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The Civil Rights Act, passed at the first session of the Thirty-ninth Congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." Act of April 9, 1866, c. 31, § 1; 14 Stat. 27.

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several States; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of States. 14 Stat. 358; 15 Stat. 708.

The first section of the Fourteenth Amendment of the Con-

## Opinion of the Court.

stitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford*, (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *The Slaughterhouse Cases*, (1873) 16 Wall. 36, 73; *Strauder v. West Virginia*, (1879) 100 U. S. 303, 306; *Ex parte Virginia*, (1879) 100 U. S. 339, 345; *Neal v. Delaware*, (1880) 103 U. S. 370, 386; *Elk v. Wilkins*, (1884) 112 U. S. 94, 101. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in *The Slaughterhouse Cases*, above cited.

In those cases, the point adjudged was that a statute of Louisiana, granting to a particular corporation the exclusive right for twenty-five years to have and maintain slaughterhouses within a certain district including the city of New Orleans, requiring all cattle intended for sale or slaughter in that district to be brought to the yards and slaughterhouses of the grantee, authorizing all butchers to slaughter their cattle there, and empowering the grantee to exact a reasonable fee for each animal slaughtered, was within the police powers of the State, and not in conflict with the Thirteenth Amendment of the Constitution as creating an involuntary servitude, nor with the Fourteenth Amendment as abridging the privileges or immunities of citizens of the United States,

## Opinion of the Court.

or as depriving persons of their liberty or property without due process of law, or as denying to them the equal protection of the laws.

Mr. Justice Miller, delivering the opinion of the majority of the court, after observing that the Thirteenth, Fourteenth and Fifteenth Articles of Amendment of the Constitution were all addressed to the grievances of the negro race, and were designed to remedy them, continued as follows: "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the Thirteenth Article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so if other rights are assailed by the States, which properly and necessarily fall within the protection of these Articles, that protection will apply, though the party interested may not be of African descent." 16 Wall. 72. And in treating of the first clause of the Fourteenth Amendment, he said: "The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." 16 Wall. 73, 74.

Mr. Justice Field, in a dissenting opinion, in which Chief Justice Chase and Justices Swayne and Bradley concurred, said of the same clause: "It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry." 16 Wall.



## Opinion of the Court.

95, 111. Mr. Justice Bradley also said: "The question is now settled by the Fourteenth Amendment itself, that citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons." 16 Wall. 112. And Mr. Justice Swayne added: "The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant all such citizens; and by 'any person' was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes and conditions of men." 16 Wall. 128, 129.

Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the Fourteenth Amendment, made this remark: "The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States, born within the United States." 16 Wall. 73. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase, is apparent from its classing foreign ministers and consuls together—whereas it was then well settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his in-



## Opinion of the Court.

tercourse with foreign States or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside. 1 Kent Com. 44; Story Conflict of Laws, § 48; Wheaton International Law, (8th ed.) § 249; *The Anne*, (1818) 3 Wheat. 435, 445, 446; *Gittings v. Crawford*, (1838) Taney, 1, 10; *In re Baiz*, (1890) 135 U. S. 403, 424.

In weighing a remark uttered under such circumstances, it is well to bear in mind the often quoted words of Chief Justice Marshall: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, (1821) 6 Wheat. 264, 399.

That neither Mr. Justice Miller, nor any of the justices who took part in the decision of *The Slaughterhouse Cases*, understood the court to be committed to the view that all children born in the United States of citizens or subjects of foreign States were excluded from the operation of the first sentence of the Fourteenth Amendment, is manifest from a unanimous judgment of the court, delivered but two years later, while all those judges but Chief Justice Chase were still on the bench, in which Chief Justice Waite said: "Allegiance and protection are, in this connection" (that is, in relation to citizenship,) "reciprocal obligations. The one is a compensation for the other: allegiance for protection, and protection for allegiance." "At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children, born in a country, of

## Opinion of the Court.

parents who were its citizens, became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens." *Minor v. Happersett*, (1874) 21 Wall. 162, 166-168. The decision in that case was that a woman born of citizen parents within the United States was a citizen of the United States, although not entitled to vote, the right to the elective franchise not being essential to citizenship.

The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the Fourteenth Amendment, is *Elk v. Wilkins*, 112 U. S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds, that the meaning of those words was, "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance;" that by the Constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in Congress and direct taxes were apportioned among the

## Opinion of the Court.

several States, and Congress was empowered to regulate commerce, not only "with foreign nations," and among the several States, but "with the Indian tribes;" that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of Congress; and, therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was observed that the language used, in defining citizenship, in the first section of the Civil Rights Act of 1866, by the very Congress which framed the Fourteenth Amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99-103.

Mr. Justice Harlan and Mr. Justice Woods, dissenting, were of opinion that the Indian in question, having severed himself from his tribe and become a *bona fide* resident of a State, had thereby become subject to the jurisdiction of the United States, within the meaning of the Fourteenth Amendment; and, in reference to the Civil Rights Act of 1866, said: "Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race (excluding only 'Indians not taxed'), who were born within

## Opinion of the Court.

the territorial limits of the United States, and were not subject to any foreign power." And that view was supported by reference to the debates in the Senate upon that act, and to the ineffectual veto thereof by President Johnson, in which he said: "By the first section of the bill, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States." 112 U. S. 112-114.

The decision in *Elk v. Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State — both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. *Calvin's Case*, 7 Rep. 1, 186; *Cockburn on Nationality*, 7; *Dicey Conflict of Laws*, 177; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 155; 2 Kent Com. 39, 42.

The principles upon which each of those exceptions rests were long ago distinctly stated by this court.

## Opinion of the Court.

In *United States v. Rice*, (1819) 4 Wheat. 246, goods imported into Castine, in the State of Maine, while it was in the exclusive possession of the British authorities during the last war with England, were held not to be subject to duties under the revenue laws of the United States, because, as was said by Mr. Justice Story in delivering judgment: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for, where there is no protection or allegiance or sovereignty, there can be no claim to obedience." 4 Wheat. 254.

In the great case of *The Exchange*, (1812) 7 Cranch, 116, the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country, were set forth by Chief Justice Marshall in a clear and powerful train of reasoning, of which it will be sufficient, for our present purpose, to give little more than the outlines. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before this court until some years afterwards in *Cherokee Nation v. Georgia*, (1831) 5 Pet. 1; nor upon the case of a suspension of the sovereignty of the United States over part of their territory by reason of a hostile occupation, such as was also afterwards presented in *United States v. Rice*, above cited. But in all other respects it covered the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof.

The Chief Justice first laid down the general principle: "The jurisdiction of the nation within its own territory is

## Opinion of the Court.

necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 7 Cranch, 136.

He then stated, and supported by argument and illustration, the propositions, that "this full and absolute territorial jurisdiction, being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power," has "given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation" — the first of which is the exemption from arrest or detention of the person of a foreign sovereign entering its territory with its license, because "a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation;" "a second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers;" "a third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions;" and, in conclusion, that "a public armed ship, in the service of a foreign sovereign, with whom the Government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly



## Opinion of the Court.

manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 137-139, 147.

As to the immunity of a foreign minister, he said: "Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents; or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it." "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." 7 Cranch, 138, 139.

The reasons for not allowing to other aliens exemption "from the jurisdiction of the country in which they are found" were stated as follows: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were

## Opinion of the Court.

not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." 7 Cranch, 144.

In short, the judgment in the case of *The Exchange* declared, as incontrovertible principles, that the jurisdiction of every nation within its own territory is exclusive and absolute, and is susceptible of no limitation not imposed by the nation itself; that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent, express or implied; that upon its consent to cede, or to waive the exercise of, a part of its territorial jurisdiction, rest the exemptions from that jurisdiction of foreign sovereigns or their armies entering its territory with its permission, and of their foreign ministers and public ships of war; and that the implied license, under which private individuals of another nation enter the territory and mingle indiscriminately with its inhabitants, for purposes of business or pleasure, can never be construed to grant to them an exemption from the jurisdiction of the country in which they are found. See also *Carlisle v. United States*, (1872) 16 Wall. 147, 155; *Radich v. Hutchins*, (1877) 95 U. S. 210; *Wildenhus's Case*, (1887) 120 U. S. 1; *Chae Chan Ping v. United States*, (1889) 130 U. S. 581, 603, 604.

From the first organization of the National Government under the Constitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time "within the limits and under the jurisdiction of the United States;" and thus applied the words "under the jurisdiction of the United States" to aliens residing here before they had taken an oath to support the Constitution of the United States, or had renounced allegiance



## Opinion of the Court.

to a foreign government. Acts of March 26, 1790, c. 3; January 29, 1795, c. 20, § 1; June 18, 1798, c. 54, §§ 1, 6; 1 Stat. 103, 414, 566, 568; April 14, 1802, c. 28, § 1; 2 Stat. 153; March 22, 1816, c. 32, § 1; 3 Stat. 258; May 24, 1828, c. 116, § 2; 4 Stat. 310; Rev. Stat. § 2165. And, from 1795, the provisions of those acts, which granted citizenship to foreign-born children of American parents, described such children as "born out of the limits and jurisdiction of the United States." Acts of January 29, 1795, c. 20, § 3; 1 Stat. 415; April 14, 1802, c. 28, § 4; 2 Stat. 155; February 10, 1855, c. 71; 10 Stat. 604; Rev. Stat. §§ 1993, 2172. Thus Congress, when dealing with the question of citizenship in that aspect, treated aliens residing in this country as "under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States."

The words "in the United States, and subject to the jurisdiction thereof," in the first sentence of the Fourteenth Amendment of the Constitution, must be presumed to have been understood and intended by the Congress which proposed the Amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of *The Exchange*; and as the equivalent of the words "within the limits and under the jurisdiction of the United States," and the converse of the words, "out of the limits and jurisdiction of the United States," as habitually used in the naturalization acts. This presumption is confirmed by the use of the word "jurisdiction" in the last clause of the same section of the Fourteenth Amendment, which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." It is impossible to construe the words "subject to the jurisdiction thereof," in the opening sentence, as less comprehensive than the words "within its jurisdiction," in the concluding sentence of the same section; or to hold that persons "within the jurisdiction" of one of the States of the Union are not "subject to the jurisdiction of the United States."

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the Fourteenth

## Opinion of the Court.

Amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.

By the Civil Rights Act of 1866, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, "not subject to any foreign power," were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children of foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the Civil Rights Act, "not subject to any foreign power," gave way, in the Fourteenth Amendment of the Constitution, to the affirmative words, "subject to the jurisdiction of the United States."

This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed — "born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof" — in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well considered opinions of the executive departments of the Government, since the adoption of the Fourteenth Amendment of the Constitution.

## Opinion of the Court.

In 1869, Attorney General Hoar gave to Mr. Fish, the Secretary of State, an opinion that children born and domiciled abroad, whose fathers were native-born citizens of the United States and had at some time resided therein, were, under the statute of February 10, 1855, c. 71, citizens of the United States, and "entitled to all the privileges of citizenship which it is in the power of the United States Government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens." "But," the Attorney General added, "while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States, by any legislation, to interfere with that relation, or, by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be, that a person 'born in a strange country, under the obedience of a strange prince or country, is an alien' (Co. Lit. 128*b*.) and that every person owes allegiance to the country of his birth." 13 Opinions of Attorneys General, 89-91.

In 1871, Mr. Fish, writing to Mr. Marsh, the American Minister to Italy, said: "The Fourteenth Amendment to the Constitution declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' This is simply an affirm-

## Opinion of the Court.

ance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, 'and subject to the jurisdiction thereof,' was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extra-territoriality." 2 Whart. Int. Dig. p. 394.

In August, 1873, President Grant, in the exercise of the authority expressly conferred upon the President by art. 2, sect. 2, of the Constitution, to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," required the opinions of the members of his cabinet upon several questions of allegiance, naturalization and expatriation. Mr. Fish, in his opinion, which is entitled to much weight, as well from the circumstances under which it was rendered, as from its masterly treatment of the subject, said :

"Every independent State has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization, and this, without regard to the municipal laws of the country whose subjects are so naturalized, as long as they remain, or exercise the rights conferred by naturalization, within the territory and jurisdiction of the State which grants it.

"It may also endow with the rights and privileges of its citizenship persons residing in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the State thus conferring its citizenship.

"But no sovereignty can extend its jurisdiction beyond its own territorial limits so as to relieve those born under and subject to another jurisdiction, from their obligations or duties thereto; nor can the municipal law of one State interfere with the duties or obligations which its citizens incur, while voluntarily resident in such foreign State and without the jurisdiction of their own country.

## Opinion of the Court.

"It is evident from the proviso in the act of 10th February, 1855, viz., 'that the rights of citizenship shall not descend to persons whose fathers never resided in the United States,' that the law-making power not only had in view this limit to the efficiency of its own municipal enactments in foreign jurisdiction; but that it has conferred only a qualified citizenship upon the children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States, or, in the language of the Fourteenth Amendment of the Constitution, have made themselves 'subject to the jurisdiction thereof.'

"The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father.

"The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.

"Such children are born to a double character: the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country; but the child, from the circumstances of his birth, may acquire rights and owes another fealty besides that which attaches to the father." Opinions of the Executive Departments on Expatriation, Naturalization and Allegiance, (1873) 17, 18; U. S. Foreign Relations, 1873-74, pp. 1191, 1192.

In 1886, upon the application of a son born in France of an American citizen, and residing in France, for a passport, Mr. Bayard, the Secretary of State, as appears by letters from him to the Secretary of Legation in Paris, and from the latter to the applicant, quoted and adopted the conclusions of Attorney General Hoar in his opinion above cited. U. S. Foreign Relations, 1886, p. 303; 2 Calvo Droit International, § 546.

## Opinion of the Court.

These opinions go to show that, since the adoption of the Fourteenth Amendment, the executive branch of the Government, the one charged with the duty of protecting American citizens abroad against unjust treatment by other nations, has taken the same view of the act of Congress of 1855, declaring children born abroad of American citizens to be themselves citizens, which, as mentioned in a former part of this opinion, the British Foreign Office has taken of similar acts of Parliament—holding that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extra-territorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country.

In a very recent case, the Supreme Court of New Jersey held that a person, born in this country of Scotch parents who were domiciled but had not been naturalized here, was "subject to the jurisdiction of the United States," within the meaning of the Fourteenth Amendment, and was "not subject to any foreign power," within the meaning of the Civil Rights Act of 1866; and, in an opinion delivered by Justice Van Syckel, with the concurrence of Chief Justice Beasley, said: "The object of the Fourteenth Amendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United States were of foreign birth, and could not have been naturalized, or in any way have become entitled to the right of citizenship. The colored people were no more subject to the jurisdiction of the United States, by reason of their birth here, than were the white children born in this country of parents who were not citizens. The same rule must be applied to both races; and unless the general rule, that when the parents are domiciled here birth establishes the right to citizenship, is accepted, the Fourteenth Amendment has failed to accomplish its purpose, and the colored people are not citizens. The Fourteenth Amendment, by the language, 'all persons born in the United States, and subject to the jurisdiction thereof,' was intended

## Opinion of the Court.

to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race." *Benny v. O'Brien*, (1895) 29 Vroom (58 N. J. Law), 36, 39, 40.

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 7 Rep. 6a, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides — seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on *Thrasher's Case* in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger



## Opinion of the Court.

born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; *United States v. Carlisle*, 16 Wall. 147, 155; *Calvin's Case*, 7 Rep. 6a; Ellesmere on Postnati, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92.

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. *Yick Wo v. Hopkins*, (1886) 118 U. S. 356; *Law Ow Bew v. United States*, (1892) 144 U. S. 47, 61, 62; *Fong Yue Ting v. United States*, (1893) 149 U. S. 698, 724; *Lem Moon Sing v. United States*, (1895) 158 U. S. 538, 547; *Wong Wing v. United States*, (1896) 163 U. S. 228, 238.

In *Yick Wo v. Hopkins* the decision was that an ordinance



## Opinion of the Court.

of the city of San Francisco, regulating a certain business, and which, as executed by the board of supervisors, made an arbitrary discrimination between natives of China, still subjects of the Emperor of China, but domiciled in the United States, and all other persons, was contrary to the Fourteenth Amendment of the Constitution. Mr. Justice Matthews, in delivering the opinion of the court, said: "The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China." "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says, 'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted, by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States, equally with those of the strangers and aliens who now invoke the jurisdiction of this court." 118 U. S. 368, 369.

The manner in which reference was made, in the passage above quoted, to § 1977 of the Revised Statutes, shows that the change of phrase in that section, reënacting § 16 of the statute of May 31, 1870, c. 114, 16 Stat. 144, as compared with § 1 of the Civil Rights Act of 1866 — by substituting, for the words in that act, "of every race and color," the words, "within the jurisdiction of the United States" — was not

## Opinion of the Court.

considered as making the section, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form; and is hardly consistent with attributing any narrower meaning to the words "subject to the jurisdiction thereof" in the first sentence of the Fourteenth Amendment of the Constitution, which may itself have been the cause of the change in the phraseology of that provision of the Civil Rights Act.

The decision in *Yick Wo v. Hopkins*, indeed, did not directly pass upon the effect of these words in the Fourteenth Amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, "subject to the jurisdiction thereof," that is to say, of the United States, at the beginning, a less comprehensive meaning than to the words "within its jurisdiction," that is, of the State, at the end of the same section; or to hold that persons, who are indisputably "within the jurisdiction" of the State, are not "subject to the jurisdiction" of the Nation.

It necessarily follows that persons born in China, subjects of the Emperor of China, but domiciled in the United States, having been adjudged, in *Yick Wo v. Hopkins*, to be within the jurisdiction of the State, within the meaning of the concluding sentence, must be held to be subject to the jurisdiction of the United States, within the meaning of the first sentence of this section of the Constitution; and their children, "born in the United States," cannot be less "subject to the jurisdiction thereof."

Accordingly, in *Quock Ting v. United States*, (1891) 140 U. S. 417, which, like the case at bar, was a writ of *habeas corpus* to test the lawfulness of the exclusion of a Chinese person who alleged that he was a citizen of the United States by birth, it was assumed on all hands that a person of the Chinese race, born in the United States, was a citizen of the United States. The decision turned upon the failure of the petitioner to prove that he was born in this country; and the question at issue was, as stated in the opinion of the majority of the court, delivered by Mr. Justice Field, "whether the evidence was sufficient to show that the petitioner was a citizen of the

## Opinion of the Court.

United States," or, as stated by Mr. Justice Brewer in his dissenting opinion, "whether the petitioner was born in this country or not." 140 U. S. 419, 423.

In *State v. Ah Chew*, (1881) 16 Nevada, 50, 58, the Supreme Court of Nevada said: "The Amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United States." In the courts of the United States in the Ninth Circuit, it has been uniformly held, in a series of opinions delivered by Mr. Justice Field, Judge Sawyer, Judge Deady, Judge Hanford and Judge Morrow, that a child born in the United States of Chinese parents, subjects of the Emperor of China, is a native-born citizen of the United States. *In re Look Tin Sing*, (1884) 10 Sawyer, 353; *Ex parte Chin King*, (1888) 13 Sawyer, 333; *In re Yung Sing Hee*, (1888) 13 Sawyer, 482; *In re Wy Shing*, (1888) 13 Sawyer, 530; *Gee Fook Sing v. United States*, (1892) 7 U. S. App. 27; *In re Wong Kim Ark*, (1896) 71 Fed. Rep. 382. And we are not aware of any judicial decision to the contrary.

During the debates in the Senate in January and February, 1866, upon the Civil Rights Bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read, "All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color." Mr. Cowan, of Pennsylvania, asked, "Whether it will not have the effect of naturalizing the children of Chinese and Gypsies, born in this country?" Mr. Trumbull answered, "Undoubtedly;" and asked, "Is not the child born in this country of German parents a citizen?" Mr. Cowan replied, "The children of German parents are citizens; but Germans are not Chinese." Mr. Trumbull rejoined: "The law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a European." Mr. Reverdy Johnson suggested that the words, "without distinction of color," should be omitted as unnecessary; and said: "The amendment, as it stands, is that all persons born in the United States, and not subject to a foreign power, shall, by virtue of birth, be citizens. To that I am willing to con-

## Opinion of the Court.

sent; and that comprehends all persons, without any reference to race or color, who may be so born." And Mr. Trumbull agreed that striking out those words would make no difference in the meaning, but thought it better that they should be retained, to remove all possible doubt. Congressional Globe, 39th Congress, 1st sess. pt. 1, pp. 498, 573, 574.

The Fourteenth Amendment of the Constitution, as originally framed by the House of Representatives, lacked the opening sentence. When it came before the Senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form, (less the words "or naturalized,") and reading, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Mr. Cowan objected, upon the ground that the Mongolian race ought to be excluded; and said: "Is the child of the Chinese immigrant in California a citizen?" "I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow-citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that State and the other Pacific States to manage them as they may see fit, they may be useful; but I would not tie their hands by the Constitution of the United States so as to prevent them hereafter from dealing with them as in their wisdom they see fit." Mr. Conness, of California, replied: "The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States." "We are entirely ready to accept the provision proposed in this Constitutional Amendment, that the children born here of Mongolian parents shall be declared by the Constitution of

## Opinion of the Court.

the United States to be entitled to civil rights and to equal protection before the law with others." Congressional Globe, 39th Congress, 1st sess. pt. 4, pp. 2890-2892. It does not appear to have been suggested, in either House of Congress, that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the Fourteenth Amendment.

Doubtless, the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves; and are, at the least, interesting as showing that the application of the Amendment to the Chinese race was considered and not overlooked.

The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicile in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. *Chae Chan Ping v. United States*, 130 U. S. 581; *Nishimura Ekiu v. United States*, 142 U. S. 651; *Fong Yue Ting v. United States*, 149 U. S. 698; *Lem Moon Sing v. United States*, 158 U. S. 538; *Wong Wing v. United States*, 163 U. S. 228.

In *Fong Yue Ting v. United States*, the right of the United States to expel such Chinese persons was placed upon the grounds, that the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, is an inherent and inalienable right of every sovereign and indepen-

## Opinion of the Court.

dent nation, essential to its safety, its independence and its welfare; that the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene; that the power to exclude and the power to expel aliens rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power; and, therefore, that the power of Congress to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. 149 U. S. 711, 713, 714.

In *Lem Moon Sing v. United States*, the same principles were reaffirmed, and were applied to a Chinese person, born in China, who had acquired a commercial domicile in the United States, and who, having voluntarily left the country on a temporary visit to China, and with the intention of returning to and continuing his residence in this country, claimed the right under a statute or treaty to reënter it; and the distinction between the right of an alien to the protection of the Constitution and laws of the United States for his person and property while within the jurisdiction thereof, and his claim of a right to reënter the United States after a visit to his native land, was expressed by the court as follows: "He is none the less an alien, because of his having a commercial domicile in this country. While he lawfully remains here, he is entitled to the benefit of the guaranties of life, liberty and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land, as if he were a native or

## Opinion of the Court.

naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reënter the United States in violation of the will of the Government as expressed in enactments of the law-making power." 158 U. S. 547, 548.

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject — always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution.

The power, granted to Congress by the Constitution, "to establish an uniform rule of naturalization," was long ago adjudged by this court to be vested exclusively in Congress. *Chirac v. Chirac*, (1817) 2 Wheat. 259. For many years after the establishment of the original Constitution, and until two years after the adoption of the Fourteenth Amendment, Congress never authorized the naturalization of any but "free white persons." Acts of March 26, 1790, c. 3, and January 29, 1795, c. 20; 1 Stat. 103, 414; April 14, 1802, c. 28, and March 26, 1804, c. 47; 2 Stat. 153, 292; March 22, 1816, c. 32; 3 Stat. 258; May 26, 1824, c. 186, and May 24, 1828, c. 116; 4 Stat. 69, 310. By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that "nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." 16 Stat. 740. By the act of July 14, 1870, c. 254, § 7, for the first time, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." 16 Stat. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should "apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent;" and it was amended by the act of February



## Opinion of the Court.

18, 1875, c. 80, by inserting the words above printed in brackets. Rev. Stat. (2d ed.) § 2169; 18 Stat. 318. Those statutes were held, by the Circuit Court of the United States in California, not to embrace Chinese aliens. *In re Ah Yup*, (1878) 5 Sawyer, 155. And by the act of May 6, 1882, c. 126, § 14, it was expressly enacted that "hereafter no state court or court of the United States shall admit Chinese to citizenship." 22 Stat. 61.

In *Fong Yue Ting v. United States*, (1893) above cited, this court said: "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws." 149 U. S. 716.

The Convention between the United States and China of 1894 provided that "Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens." 28 Stat. 1211. And it has since been decided, by the same judge who held this appellee to be a citizen of the United States by virtue of his birth therein, that a native of China of the Mongolian race could not be admitted to citizenship under the naturalization laws. *In re Gee Hop*, (1895) 71 Fed. Rep. 274.

The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case



## Opinion of the Court.

of the annexation of foreign territory ; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." *Osborn v. United States Bank*, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been ; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain

## Opinion of the Court.

classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. § 1996, reënacting act of July 27, 1868, c. 249, § 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents act-

Dissenting Opinion: Fuller, C.J., Harlan, J.

ing for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

*Order affirmed.*

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, dissenting.

I cannot concur in the opinion and judgment of the court in this case.

The proposition is that a child born in this country of parents who were not citizens of the United States, and under the laws of their own country and of the United States could not become such — as was the fact from the beginning of the Government in respect of the class of aliens to which the parents in this instance belonged — is, from the moment of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment, any act of Congress to the contrary notwithstanding.

The argument is, that although the Constitution prior to that amendment nowhere attempted to define the words "citizens of the United States" and "natural-born citizen" as used therein, yet that it must be interpreted in the light of the English common law rule which made the place of birth the criterion of nationality; that that rule "was in force in all

## Dissenting Opinion: Fuller, C.J., Harlan, J.

the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established ;” and “that before the enactment of the Civil Rights Act of 1866 and the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign Government, were native-born citizens of the United States.”

Thus the Fourteenth Amendment is held to be merely declaratory except that it brings all persons, irrespective of color, within the scope of the alleged rule, and puts that rule beyond the control of the legislative power.

If the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since July 28, 1868, when the amendment was declared ratified, were, and are, aliens, unless they have, or shall on attaining majority, become citizens by naturalization in the United States; and no statutory provision to the contrary is of any force or effect. And children who are aliens by descent, but born on our soil, are exempted from the exercise of the power to exclude or to expel aliens, or any class of aliens, so often maintained by this court, an exemption apparently disregarded by the acts in respect of the exclusion of persons of Chinese descent.

The English common law rule, which it is insisted was in force after the Declaration of Independence, was that “every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject; save only the children of foreign ambassadors, (who were excepted because their fathers carried their own nationality with them,) or a child born to a foreigner during the hostile occupation of any part of the territories of England.” Cockburn on Nationality, 7.

The tie which bound the child to the Crown was indissolu-

Dissenting Opinion: Fuller, C.J., Harlan, J.

ble. The nationality of his parents had no bearing on his nationality. Though born during a temporary stay of a few days, the child was irretrievably a British subject. Hall on Foreign Jurisdiction, etc., § 15.

The rule was the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liegemen to their liege lord. It was not local and temporary as was the obedience to the laws owed by aliens within the dominions of the Crown, but permanent and indissoluble, and not to be cancelled by any change of time or place or circumstances.

And it is this rule, pure and simple, which it is asserted determined citizenship of the United States during the entire period prior to the passage of the act of April 9, 1866, and the ratification of the Fourteenth Amendment, and governed the meaning of the words "citizen of the United States" and "natural-born citizen" used in the Constitution as originally framed and adopted. I submit that no such rule obtained during the period referred to, and that those words bore no such construction; that the act of April 9, 1866, expressed the contrary rule; that the Fourteenth Amendment prescribed the same rule as the act; and that if that amendment bears the construction now put upon it, it imposed the English common law rule on this country for the first time and made it "absolute and unbending," just as Great Britain was being relieved from its inconveniences.

Obviously, where the Constitution deals with common law rights and uses common law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does international relations, and political as contradistinguished from civil status, international principles must be considered, and, unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction.

Nationality is essentially a political idea, and belongs to the sphere of public law. Hence Mr. Justice Story, in *Shanks v. Dupont*, 3 Pet. 242, 248, said that the incapacities of *femes*

Dissenting Opinion: Fuller, C.J., Harlan, J.

covert, at common law, "do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations."

Twiss in his work on the *Law of Nations* says that "natural allegiance, or the obligation of perpetual obedience to the government of a country, wherein a man may happen to have been born, which he cannot forfeit, or cancel, or vary by any change of time, or place, or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law." Vol. 1, p. 231.

Before the Revolution, the views of the publicists had been thus put by Vattel: "The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country." Book I, c. 19, § 212. "The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage. . . . The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction."

And to the same effect are the modern writers, as for in-

Dissenting Opinion; Fuller, C.J., Harlan, J.

stance, Bar, who says: "To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parents determines it—that of the father where children are lawful, and where they are bastards that of their mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent." Int. Law, § 31.

The framers of the Constitution were familiar with the distinctions between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin, and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

Manifestly, when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the Colonies, in derogation of the principles on which the new government was founded, was abrogated.

The States, for all national purposes embraced in the Constitution, became one, united under the same sovereign authority, and governed by the same laws, but they retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the General Government or restrained by the Constitution, and protection to life, liberty and property rested primarily with them. So far as the *jus commune*, or *folk-right*, relating to the rights of persons, was concerned, the Colonies regarded it as their birthright, and adopted such parts of it as they found applicable to their condition. *Van Ness v. Pacard*, 2 Pet. 137.

They became sovereign and independent States, and when the Republic was created each of the thirteen States had its own local usages, customs and common law, while in respect of the National Government there necessarily was no general, independent and separate common law of the United States, nor has there ever been. *Wheaton v. Peters*, 8 Pet. 591, 658.



Dissenting Opinion: Fuller, C.J., Harlan, J.

As to the *jura coronæ*, including therein the obligation of allegiance, the extent to which these ever were applicable in this country depended on circumstances, and it would seem quite clear that the rule making locality of birth the criterion of citizenship because creating a permanent tie of allegiance, no more survived the American Revolution than the same rule survived the French Revolution.

Doubtless, before the latter event, in the progress of monarchical power, the rule which involved the principle of liege homage may have become the rule of Europe; but that idea never had any basis in the United States.

As Chief Justice Taney observed in *Fleming v. Page*, 9 How. 603, 618, though in a different connection: "It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."

And Mr. Lawrence, in his edition of Wheaton (Lawrence's Wheaton, p. 920), makes this comment: "There is, it is believed, as great a difference between the territorial allegiance claimed by an hereditary sovereign on feudal principles, and the personal right of citizenship participated in by all the members of the political community, according to American institutions, as there is between the authority and sovereignty of the Queen of England, and the power of the American President; and the inapplicability of English precedents is as clear in the one case as in the other. The same view, with particular application to naturalization, was early taken by



Dissenting Opinion: Fuller, C.J., Harlan, J.

the American commentator on Blackstone. Tucker's Blackstone, Vol. 1, Pt. 2, Appx. p. 96."

Blackstone distinguished allegiance into two sorts, the one natural and perpetual; the other local and temporary. Natural allegiance, so-called, was allegiance resulting from birth in subjection to the Crown, and indelibility was an essential, vital and necessary characteristic.

The Royal Commission to inquire into the Laws of Naturalization and Allegiance was created May 21, 1868; and, in their report, the Commissioners, among other things, say: "The allegiance of a natural-born British subject is regarded by the Common Law as indelible. We are of opinion that this doctrine of the Common Law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of emigration."

However, the Commission by a majority declined to recommend the abandonment of the rule altogether though "clearly of opinion that it ought not to be, as it now is, absolute and unbending;" but recommended certain modifications which were carried out in subsequent legislation.

But from the Declaration of Independence to this day, the United States have rejected the doctrine of indissoluble allegiance and maintained the general right of expatriation, to be exercised in subordination to the public interests and subject to regulation.

As early as the act of January 29, 1795, c. 20, 1 Stat. 414, applicants for naturalization were required to take not simply an oath to support the Constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or State, and particularly to the prince or State of which they were before the citizens or subjects.

The statute 3 Jac. 1, c. 4, provided that promising obedience

Dissenting Opinion: Fuller, C.J., Harlan, J.

to any other prince, State or potentate subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason; and in respect of the act of 1795 Lord Grenville wrote to our minister, Rufus King: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part." 2 Amer. St. Pap. 149. And see *Fitch v. Weber*, 6 Hare, 51.

Nevertheless, Congress has persisted from 1795 in rejecting the English rule and in requiring the alien, who would become a citizen of the United States, in taking on himself the ties binding him to our Government, to affirmatively sever the ties that bound him to any other.

The subject was examined at length in 1856, in an opinion given the Secretary of State by Attorney General Cushing, 8 Opins. Attys. Gen. 139, where the views of the writers on international law and those expressed in cases in the Federal and state courts are largely set forth, and the Attorney General says: "The doctrine of absolute and perpetual allegiance, the root of the denial of any right of emigration, is inadmissible in the United States. It was a matter involved in, and settled for us by the Revolution, which founded the American Union.

"Moreover, the right of expatriation, under fixed circumstances of time and of manner, being expressly asserted in the legislatures of several of the States, and confirmed by decisions of their courts, must be considered as thus made a part of the fundamental law of the United States."

Expatriation included not simply the leaving of one's native country, but the becoming naturalized in the country adopted as a future residence. The emigration which the United States encouraged was that of those who could become incorporate with its people; make its flag their own; and aid in the accomplishment of a common destiny; and it was obstruction to such emigration that made one of the charges against the Crown in the Declaration.

Dissenting Opinion: Fuller, C.J., Harlan, J.

*Ainslie v. Martin*, 9 Mass. 454, 460, (1813); *Murray v. McCarty*, 2 Munf. 393, (1811); *Alsberry v. Hawkins*, 9 Dana, 177, (1839) are among the cases cited. In *Ainslie v. Martin*, the indelibility of allegiance according to the common law rule was maintained; while in *Murray v. McCarty* and *Alsberry v. Hawkins*, the right of expatriation was recognized as a practical and fundamental doctrine of America. There was no uniform rule so far as the States were severally concerned, and none such assumed in respect of the United States.

In 1859, Attorney General Black thus advised the President (9 Op. 356): "The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place—the general right, in one word, of expatriation, is incontestable. I know that the common law of England denies it; that the judicial decisions of that country are opposed to it; and that some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion. But all this is very far from settling the question. The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance."

In the opinion of the Attorney General, the United States, in recognizing the right of expatriation, declined, from the beginning, to accept the view that rested the obligation of the citizen on feudal principles, and proceeded on the law of nations, which was in direct conflict therewith.

And the correctness of this conclusion was specifically affirmed not many years after, when the right as the natural and inherent right of all people and fundamental in this country, was declared by Congress in the act of July 27, 1868, 15 Stat. 223, c. 249, carried forward into sections 1999 and 2000 of the Revised Statutes, in 1874.

Dissenting Opinion: Fuller, C.J., Harlan, J.

It is beyond dispute that the most vital constituent of the English common law rule has always been rejected in respect of citizenship of the United States.

Whether it was also the rule at common law that the children of British subjects born abroad were themselves British subjects — nationality being attributed to parentage instead of locality — has been variously determined. If this were so, of course the statute of Edw. III was declaratory, as was the subsequent legislation. But if not, then such children were aliens, and the statute of 7 Anne and subsequent statutes must be regarded as in some sort acts of naturalization. On the other hand, it seems to me that the rule *partus sequitur patrem* has always applied to children of our citizens born abroad and that the acts of Congress on this subject are clearly declaratory, passed out of abundant caution to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere.

Section 1993 of the Revised Statutes provides that children so born "are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent non-residence, and this limitation was contained in all the acts from 1790 down. Section 2172 provides that such children shall "be considered as citizens thereof."

The language of the statute of 7 Anne, c. 5, is quite different in providing that, "the children of all natural-born subjects born out of the ligeance of Her Majesty, her heirs and successors, shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever."

In my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government. If not, and if the correct view is that they were aliens but collectively naturalized under the acts of Congress which recognized them as natural-born, then those born since the Fourteenth Amendment are not citizens at all,

Dissenting Opinion: Fuller, C.J., Harlan, J.

unless they have become such by individual compliance with the general laws for the naturalization of aliens, because they are not naturalized "*in the United States.*"

By the fifth clause of the first section of article two of the Constitution it is provided that: "No person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of the Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

In the convention it was, *says* Mr. Bancroft, "objected that no number of years could properly prepare a foreigner for that place; but as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions, on the seventh of September, it was unanimously settled that foreign-born residents of fourteen years who should be citizens at the time of the formation of the Constitution are eligible to the office of President." 2 Bancroft Hist. U. S. Const. 193.

Considering the circumstances surrounding the framing of the Constitution, I submit that it is unreasonable to conclude that "natural-born citizen" applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay or other race, were eligible to the Presidency, while children of our citizens, born abroad, were not.

By the second clause of the second section of article one it is provided that: "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State of which he shall be chosen;" and by the third clause of section three, that: "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

Dissenting Opinion: Fuller, C.J., Harlan, J.

At that time the theory largely obtained, as stated by Mr. Justice Story, in his Commentaries on the Constitution, "that every citizen of a State is *ipso facto* a citizen of the United States." § 1693.

Mr. Justice Curtis, in *Dred Scott v. Sandford*, 19 How. 396, 576, expressed the opinion that under the Constitution of the United States "every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States." And he said: "Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the Government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts. *First*: The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. *Second*: Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. *Third*: What native-born persons should be citizens of the United States.

"The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and, in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty, by an examination of all such other clauses of the Constitution as touch this subject."

Dissenting Opinion: Fuller, C.J., Harlan, J.

But in that case Mr. Chief Justice Taney said: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people' and every citizen is one of this people and a constituent member of this sovereignty. . . . In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of a citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal



Dissenting Opinion: Fuller, C.J., Harlan, J.

Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character."

Plainly the distinction between citizenship of the United States and citizenship of a State thus pointed out, involved then, as now, the complete rights of the citizen internationally as contradistinguished from those of persons not citizens of the United States.

The English common law rule recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents. As allegiance sprang from the place of birth regardless of parentage and supervened at the moment of birth, the inquiry whether the parents were permanently or only temporarily within the realm was wholly immaterial. And it is settled in England that the question of domicile is entirely distinct from that of allegiance. The one relates to the civil, and the other to the political status. *Udny v. Udny*, L. R. 1 H. L. Sc. 441, 457.

But a different view as to the effect of permanent abode on nationality has been expressed in this country.

In his work on Conflict of Laws, § 48, Mr. Justice Story, treating the subject as one of public law, said: "Persons who are born in a country are generally deemed to be citizens of that country. A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health or curiosity, or occasional business. It would be difficult, however, to assert that in the present state of public law such a qualification is universally established."

Undoubtedly all persons born in a country are presumptively citizens thereof, but the presumption is not irrebutable.

In his Lectures on Constitutional Law, p. 279, Mr. Justice Miller remarked: "If a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the coun-



Dissenting Opinion: Fuller, C.J., Harlan, J.

try with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction."

And to the same effect are the rulings of Mr. Secretary Frelinghuysen in the matter of Hausding, and Mr. Secretary Bayard in the matter of Greisser.

Hausding was born in the United States, went to Europe, and, desiring to return, applied to the minister of the United States for a passport, which was refused on the ground that the applicant was born of Saxon subjects temporarily in the United States. Mr. Secretary Frelinghuysen wrote to Mr. Kasson, our minister: "You ask 'Can one born a foreign subject, but within the United States, make the option after his majority, and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by emigration and legal process of naturalization.' Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at the time within the jurisdiction of the tribunal of record which confers that character."

Greisser was born in the State of Ohio in 1867, his father being a German subject and domiciled in Germany, to which country the child returned. After quoting the act of 1866 and the Fourteenth Amendment, Mr. Secretary Bayard said: "Richard Greisser was no doubt born in the United States, but he was on his birth 'subject to a foreign power,' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute and the Constitution a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship." 2 Whart. Int. Dig. 399.

The Civil Rights Act became a law April 9, 1866 (14 Stat. 27, c. 31), and provided: "That all persons born in the United States and not subject to any foreign power, excluding Indians

## Dissenting Opinion: Fuller, C.J., Harlan, J.

not taxed, are hereby declared to be citizens of the United States." And this was reenacted June 22, 1874, in the Revised Statutes, section 1992.

The words "not subject to any foreign power" do not in themselves refer to mere territorial jurisdiction, for the persons referred to are persons born in the United States. All such persons are undoubtedly subject to the territorial jurisdiction of the United States, and yet the act concedes that nevertheless they may be subject to the political jurisdiction of a foreign government. In other words, by the terms of the act all persons born in the United States, and not owing allegiance to any foreign power, are citizens.

The allegiance of children so born is not the local allegiance arising from their parents merely being domiciled in the country, and it is single and not double allegiance. Indeed double allegiance in the sense of double nationality has no place in our law, and the existence of a man without a country is not recognized.

But it is argued that the words "and not subject to any foreign power" should be construed as excepting from the operation of the statute only the children of public ministers and of aliens born during hostile occupation.

Was there any necessity of excepting them? And if there were others described by the words, why should the language be construed to exclude them?

Whether the immunity of foreign ministers from local allegiance rests on the fiction of extra-territoriality or on the waiver of territorial jurisdiction by receiving them as representatives of other sovereignties, the result is the same.

They do not owe allegiance otherwise than to their own governments, and their children cannot be regarded as born within any other.

And this is true as to the children of aliens within territory in hostile occupation, who necessarily are not under the protection of, nor bound to render obedience to, the sovereign whose domains are invaded; but it is not pretended that the children of citizens of a government so situated would not become its citizens at their birth, as the permanent allegiance

Dissenting Opinion: Fuller, C.J., Harlan, J.

of their parents would not be severed by the mere fact of the enemy's possession.

If the act of 1866 had not contained the words, "and not subject to any foreign power," the children neither of public ministers nor of aliens in territory in hostile occupation would have been included within its terms on any proper construction, for their birth would not have subjected them to ties of allegiance, whether local and temporary, or general and permanent.

There was no necessity as to them for the insertion of the word, although they were embraced by them.

If there were others in respect of whom the exception was needed, namely, the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words were inserted.

Two months after the statute was enacted, on June 16, 1866, the Fourteenth Amendment was proposed, and declared ratified July 28, 1868. The first clause of the first section reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The act was passed and the amendment proposed by the same Congress, and it is not open to reasonable doubt that the words "subject to the jurisdiction thereof" in the amendment were used as synonymous with the words "and not subject to any foreign power" of the act.

The jurists and statesmen referred to in the majority opinion, notably Senators Trumbull and Reverdy Johnson, concurred in that view, Senator Trumbull saying: "What do we mean by 'subject to the jurisdiction of the United States'? Not owing allegiance to anybody else; that is what it means." And Senator Johnson: "Now, all that this amendment pro-

Dissenting Opinion: Fuller, C.J., Harlan, J.

vides is that all persons born within the United States and not subject to some foreign power—for that no doubt is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States.” Cong. Globe, 1st Sess. 39th Cong., 2893 *et seq.*

This was distinctly so ruled in *Elk v. Wilkins*, 112 U. S. 94; and no reason is perceived why the words were used if they apply only to that obedience which all persons, not possessing immunity therefrom, must pay the laws of the country in which they happen to be.

Dr. Wharton says that the words “subject to the jurisdiction” must be construed in the sense which international law attributes to them, but that the children of our citizens born abroad, and of foreigners born in the United States have the right on arriving at full age to elect one allegiance and repudiate the other. Whart. Conflict of Laws, §§ 10, 11, 12.

The Constitution and statutes do not contemplate double allegiance, and how can such election be determined? By section 1993 of the Revised Statutes, the citizenship of the children of our citizens born abroad may be terminated in that generation by their persistent abandonment of their country; while by sections 2167 and 2168, special provision is made for the naturalization of alien minor residents, on attaining majority, by dispensing with the previous declaration of intention and allowing three years of minority on the five years’ residence required; and also for the naturalization of children of aliens whose parents have died after making declaration of intention. By section 2172 children of naturalized citizens are to be considered citizens.

While then the naturalization of the father carries with it that of his minor children, and his declaration of intention relieves them from the preliminary steps for naturalization, and minors are allowed to count part of the residence of their minority on the whole term required and are relieved from the declaration of intention, the statutes make no provision for formal declaration of election by children born in this country of alien parents on attaining majority.

The point, however, before us, is whether permanent alle-

Dissenting Opinion : Fuller, C.J., Harlan, J.

giance is imposed at birth without regard to circumstances — permanent until thrown off and another allegiance acquired by formal acts — not local and determined by a mere change of domicil.

The Fourteenth Amendment came before the court in *The Slaughterhouse Cases*, 16 Wall. 36, 73, at December term, 1872 (the cases having been brought up by writ of error in May, 1870, 10 Wall. 273), and it was held that the first clause was intended to define citizenship of the United States and citizenship of a State, which definitions recognized the distinction between the one and the other ; that the privileges and immunities of citizens of the States embrace generally those fundamental civil rights for the security of which organized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments ; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof ; and that it is the latter which are placed under the protection of Congress by the second clause.

And Mr. Justice Miller, delivering the opinion of the court, in analyzing the first clause, observed that "the phrase 'subject to the jurisdiction thereof' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign States, born within the United States."

That eminent judge did not have in mind the distinction between persons charged with diplomatic functions and those who were not, but was well aware that consuls are usually the citizens or subjects of the foreign States from which they come, and that, indeed, the appointment of natives of the places where the consular service is required, though permissible, has been pronounced objectionable in principle.

His view was that the children of "citizens or subjects of foreign States," owing permanent allegiance elsewhere and only local obedience here, are not otherwise subject to the jurisdiction of the United States than are their parents.

Dissenting Opinion: Fuller, C.J., Harlan, J.

Mr. Justice Field dissented from the judgment of the court, and subsequently in the case of *Look Tin Sing*, 10 Sawyer, 353, in the Circuit Court for the District of California, held children born of Chinese parents in the United States to be citizens, and the cases subsequently decided in the Ninth Circuit followed that ruling. Hence the conclusion in this case which the able opinion of the District Judge shows might well have been otherwise.

I do not insist that, although what was said was deemed essential to the argument and a necessary part of it, the point was definitively disposed of in the *Slaughterhouse Cases*, particularly as Chief Justice Waite in *Minor v. Happersett*, 21 Wall. 162, 167, remarked that there were doubts, which for the purposes of the case then in hand it was not necessary to solve. But that solution is furnished in *Elk v. Wilkins*, 112 U. S. 94, 101, where the subject received great consideration and it was said:

"By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, *Scott v. Sandford*, 19 How. 393; and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States, and of the State in which they reside. *Slaughterhouse Cases*, 16 Wall. 36, 73; *Strauder v. West Virginia*, 100 U. S. 303, 306.

"This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do

Dissenting Opinion: Fuller, C.J., Harlan, J.

to the time of naturalization in the other. *Persons not thus subject to the jurisdiction of the United States at the time of birth* cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

To be "completely subject" to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

Now I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.

Generally speaking, I understand the subjects of the Emperor of China—that ancient Empire, with its history of thousands of years and its unbroken continuity in belief, traditions and government, in spite of revolutions and changes of dynasty—to be bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance, and their abettors; and, in effect, held the relatives at home of Chinese in foreign lands as hostages for their loyalty.<sup>1</sup> And

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<sup>1</sup> The fundamental laws of China have remained practically unchanged since the second century before Christ. The statutes have from time to time undergone modifications, but there does not seem to be any English or French translation of the Chinese Penal Code later than that by Staunton, published in 1810. That code provided: "All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded; and in the punishment of this offence, no distinction shall be made between principals and accessories. The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of State. . . . The parents, grandparents, brothers and grand-



## Dissenting Opinion: Fuller, C.J., Harlan, J.

whatever concession may have been made by treaty in the direction of admitting the right of expatriation in some sense, they seem in the United States to have remained pilgrims and sojourners as all their fathers were. 149 U. S. 717. At all events, they have never been allowed by our laws to acquire our nationality, and, except in sporadic instances, do not appear ever to have desired to do so.

The Fourteenth Amendment was not designed to accord citizenship to persons so situated and to cut off the legislative power from dealing with the subject.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of a country, is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. 149 U. S. 707.

But can the persons expelled be subjected to "cruel and unusual punishments" in the process of expulsion, as would be the case if children born to them in this country were separated from them on their departure, because citizens of the United States? Was it intended by this amendment to tear up parental relations by the roots?

The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." Was it intended thereby that children of aliens should, by virtue of being born in the

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children of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2000 *lee*.

"All those who purposely conceal and connive at the perpetration of this crime, shall be strangled. Those who inform against, and bring to justice, criminals of this description, shall be rewarded with the whole of their property.

"Those who are privy to the perpetration of this crime, and yet omit to give any notice or information thereof to the magistrates, shall be punished with 100 blows and banished perpetually to the distance of 3000 *lee*.

"If the crime is contrived, but not executed, the principal shall be strangled, and all the accessories shall, each of them, be punished with 100 blows, and perpetual banishment to the distance of 3000 *lee*. . . ." Staunton's Penal Code of China, 272, § 255.



Dissenting Opinion: Fuller, C.J., Harlan, J.

United States, be entitled on attaining majority to vote irrespective of the treaties and laws of the United States in regard to such aliens?

In providing that persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens, the Fourteenth Amendment undoubtedly had particular reference to securing citizenship to the members of the colored race, whose servile status had been obliterated by the Thirteenth Amendment, and who had been born in the United States, but were not and never had been subject to any foreign power. They were not aliens, (and even if they could be so regarded, this operated as a collective naturalization,) and their political status could not be affected by any change of the laws for the naturalization of individuals.

Nobody can deny that the question of citizenship in a nation is of the most vital importance. It is a precious heritage, as well as an inestimable acquisition; and I cannot think that any safeguard surrounding it was intended to be thrown down by the amendment.

In suggesting some of the privileges and immunities of national citizenship, in the *Slaughterhouse Cases* Mr. Justice Miller said: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States."

Mr. Hall says in his work on Foreign Jurisdiction, etc., §§ 2, 5, the principle is that "the legal relations by which a person is encompassed in his country of birth and residence cannot be wholly put aside when he goes abroad for a time; many of the acts which he may do outside his native state have inevitable consequences within it. He may for many purposes be temporarily under the control of another sovereign than his own, and he may be bound to yield to a foreign government a large measure of obedience; but his own State still possesses a right to his allegiance; he is still an integral part of the national community. A State therefore can enact laws,

Dissenting Opinion: Fuller, C.J., Harlan, J.

enjoining or forbidding acts, and defining legal relations, which apply to its subjects abroad in common with those within its dominions. It can declare under what conditions it will regard as valid, acts done in foreign countries, which profess to have legal effect; it can visit others with penalties; it can estimate circumstances and facts as it chooses." On the other hand, the "duty of protection is correlative to the rights of a sovereign over his subjects; the maintenance of a bond between a State and its subjects while they are abroad implies that the former must watch over and protect them within the due limit of the rights of other States. . . . It enables governments to exact reparation for oppression from which their subjects have suffered, or for injuries done to them otherwise than by process of law; and it gives the means of guarding them against the effect of unreasonable laws, of laws totally out of harmony with the nature or degree of civilization by which a foreign power affects to be characterized, and finally of an administration of the laws had beyond a certain point. When in these directions a State grossly fails in its duties; when it is either incapable of ruling, or rules with patent injustice, the right of protection emerges in the form of diplomatic remonstrance, and in extreme cases of ulterior measures. It provides a material sanction for rights; it does not offer a theoretic foundation. It does not act within a foreign territory with the consent of the sovereign; it acts against him contentiously from without."

The privileges or immunities which, by the second clause of the amendment, the States are forbidden to abridge are the privileges or immunities pertaining to citizenship of the United States, but that clause also places an inhibition on the States from depriving any person of life, liberty or property, and from denying "to any person within its jurisdiction, the equal protection of the laws," that is, of its own laws—the laws to which its own citizens are subjected.

The jurisdiction of the State is necessarily local, and the limitation relates to rights primarily secured by the States and not by the United States. Jurisdiction as applied to the General Government embraces international relations; as ap-

Dissenting Opinion : Fuller, C.J., Harlan, J.

plied to the State, it refers simply to its power over persons and things within its particular limits.

These considerations lead to the conclusion that the rule in respect of citizenship of the United States prior to the Fourteenth Amendment differed from the English common law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary, and birth during permanent, residence. If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely temporary, either in fact, or in point of law.

Did the Fourteenth Amendment impose the original English common law rule as a rigid rule on this country?

Did the amendment operate to abridge the treaty-making power, or the power to establish an uniform rule of naturalization?

I insist that it cannot be maintained that this Government is unable through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein.

A treaty couched in those precise terms would not be incompatible with the Fourteenth Amendment, unless it be held that that amendment has abridged the treaty-making power.

Nor would a naturalization law excepting persons of a certain race and their children be invalid, unless the amendment has abridged the power of naturalization. This cannot apply to our colored fellow-citizens, who never were aliens — were never beyond the jurisdiction of the United States.

"Born in the United States, and subject to the jurisdiction thereof," and "naturalized in the United States, and subject to the jurisdiction thereof," mean born or naturalized under such circumstances as to be completely subject to that jurisdiction, that is, as completely as citizens of the United States,

Dissenting Opinion: Fuller, C.J., Harlan, J.

who are of course not subject to any foreign power, and can of right claim the exercise of the power of the United States on their behalf wherever they may be. When, then, children are born in the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized, such children are not born so subject to the jurisdiction as to become citizens, and entitled on that ground to the interposition of our Government, if they happen to be found in the country of their parents' origin and allegiance, or any other.

Turning to the treaty between the United States and China, concluded July 28, 1868, the ratifications of which were exchanged November 23, 1869, and the proclamation made February 5, 1870, we find that, by its sixth article, it was provided: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect of travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization on the citizens of the United States in China, nor upon the subjects of China in the United States."

It is true that in the fifth article, the inherent right of man to change his home or allegiance was recognized, as well as "the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of traffic, or as permanent residents."

All this, however, had reference to an entirely voluntary emigration for these purposes, and did not involve an admission of change of allegiance unless both countries assented, but the contrary according to the sixth article.

By the convention of March 17, 1894, it was agreed "that Chinese laborers or Chinese of any other class, either perma-

Dissenting Opinion: Fuller, C.J., Harlan, J.

nently or temporarily residing within the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens."

These treaties show that neither Government desired such change nor assented thereto. Indeed, if the naturalization laws of the United States had provided for the naturalization of Chinese persons, China manifestly would not have been obliged to recognize that her subjects had changed their allegiance thereby. But our laws do not so provide, and, on the contrary, are in entire harmony with the treaties.

I think it follows that the children of Chinese born in this country do not, *ipso facto*, become citizens of the United States unless the Fourteenth Amendment overrides both treaty and statute. Does it bear that construction; or rather is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?

But the Chinese under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Wharton Conf. Laws, § 12.

In *Fong Yue Ting v. United States*, 149 U. S. 698, 717, it was said in respect of the treaty of 1868; "After some years' experience under that treaty, the Government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests; and therefore requested and obtained from China a modification of the treaty."

It is not to be admitted that the children of persons so situated become citizens by the accident of birth. On the con-

Dissenting Opinion : Fuller, C.J., Harlan, J.

trary, I am of opinion that the President and Senate by treaty, and the Congress by naturalization, have the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this country under such consent, in spite of treaty and statute.

In other words, the Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens ; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens.

Tested by this rule, Wong Kim Ark never became and is not a citizen of the United States, and the order of the District Court should be reversed.

I am authorized to say that MR. JUSTICE HARLAN concurs in this dissent.

MR. JUSTICE McKENNA, not having been a member of the court when this case was argued, took no part in the decision.